No. 11773

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SOUTHERN PACIFIC COMPANY, a corporation,

Appellant,

vs.

WILLIAM K. CARSON,

Appellee.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

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Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

INDEX TO EXHIBITS

NAMES AND ADDRESSES OF ATTORNEYS:

For Appellant:

C. W. CORNELL

O. O. COLLINS

MALCOLM ARCHBALD

JOHN R. ALLPORT

670 Pacific Electric Building

Los Angeles 14, Calif.

For Appellee:

HILDEBRAND, BILLS & McLEOD

312 Bartlett Building

215 West Seventh Street

Los Angeles 14, Calif. [1*]

*Page number appearing at foot of Certified Transcript.

In the District Court of the United States for the Southern District of California
Central Division

No. 6950-M

WILLIAM K. CARSON,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a corporation,

Defendant.

COMPLAINT FOR DAMAGES

Plaintiff complains of defendant and for cause of action alleges:

I.

That at all times herein mentioned defendant was and now is a corporation organized and existing under and by virtue of the laws of the State of Kentucky and doing business in the State of California, and other states; and that said defendant was at all times herein mentioned and now is engaged in the business of a common carrier by railroad in interstate commerce in the State of California and other states.

II.

That at all times herein mentioned defendant was a common carrier by railroad engaged in interstate commerce, and plaintiff was employed by defendant in such interstate commerce, and [2] the injuries to plaintiff hereinafter complained of arose in the course of and while plaintiff and defendant were engaged in the conduct of such interstate commerce.

III.

That this action is brought under and by virtue of the provisions of the Federal Employers' Liability Act, 45 U. S. C. A. 51, et seq.

IV.

That on or about the 2nd day of February, 1947, at or about the hour of 10:30 o'clock A. M. thereof, plaintiff was employed by defendant as a switchman, working in defendant's railroad yards in the City of Tucson, State of Arizona.

V.

That at said time and place acting in the regular course and scope of his duties, plaintiff was riding on the brake platform of a certain tank car, a portion of a cut of three freight cars which had been kicked over defendant's track #11 in said yards; that it was plaintiff's duty to and he was attempting to slow the movement of said cars by means of operating the brake wheel on said tank car by means of using a brake club; that at said time and place defendant owed to plaintiff the duty of exercising ordinary care to provide him with a reasonably safe equipment with which to work; that at said time and place defendant carelessly and negligently furnished plaintiff with defective brake club in that the same was caused to be weak and not strong enough to stand up under the ordinary work done by plaintiff; that as a direct and proximate result of said carelessness and negligence, said brake club was caused to break thereby causing plaintiff to be thrown violently against the end of the said tank car and to sustain the injuries hereinafter enumerated.

VI.

That as a direct and proximate result of the carelessness [3] and negligence of defendant, as aforesaid, plaintiff was rendered sick, sore, lame, disabled and disordered, both internally and externally, and received the following personal injuries, to wit: severe injury in the region of the right shoulder, severe strain in the region of the low back; severe damage to the left side of plaintiff's body in the region of the hip and leg with nerve involvement, extreme pain and suffering and a severe shock to his nervous system.

VII.

That at the time of the happening of the aforesaid accident, plaintiff was a strong and able bodied man capable of earning and earning the sum of approximately Three Hundred Dollars ($300.00) per month; that by reason of the carelessness and negligence of defendant, as aforesaid, and the injuries proximately caused plaintiff thereby, plaintiff is now, and will be for an indefinite period of time in the future, rendered incapable of performing his usual work or services or any work or services whatsoever, all to plaintiff's damage in an amount as yet unascertainable, and that when said sum is ascertained, plaintiff will pray leave of Court to insert said sum as the reasonable value of said loss of services.

VIII.

That as a direct and proximate result of the carelessness and negligence of defendant, as aforesaid, plaintiff has been generally damages in the sum of Fifty Thousand Dollars ($50,000.00).

Wherefore, plaintiff prays judgment against defendant in the sum of Fifty Thousand Dollars ($50,000.00) together with such special damages as may be hereafter ascertained and for his costs of suit incurred herein.

HILDEBRAND, BILLS & McLEOD
By C. McLeod
Attorneys for Plaintiff [4]

[Vertified.]

[Endorsed]: Filed May 7, 1947. [5]

[Title of District Court and Cause]

SUMMONS

To the above named Defendant:

You are hereby summoned and required to serve upon Hildebrand, Bills & McLeod, plaintiff's attorneys, whose address is 1212 Broadway, Oakland 12, California, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

[Seal of Court] EDMUND L. SMITH
Clerk of Court
By Charles A. Seitz
Deputy Clerk

Date: May 7, 1947.

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure. [6]

RETURN ON SERVICE OF WRIT

I hereby certify and return, that on the 14th day of May, 1947, I received the within summons and complaint and served the same on Southern Pacific Co. by serving Roy G. Hilebrand as Secretary at San Francisco, California, on the 14th day of May, 1947.

GEORGE VICE
United States Marshal

By.....
Deputy United States Marshal

Marshal's Fees

Travel.....	$ .20
Service.....	2.00
	2.20

Subscribed and sworn to before me, a
this day of 19 .

(Seal) HERBERT R. COLE

[Endorsed]: Filed May 16, 1947. [7]

[Title of District Court and Cause]

ANSWER OF DEFENDANT SOUTHERN PACIFIC COMPANY AND DEMAND FOR JURY TRIAL

Comes now the defendant Southern Pacific Company, a corporation, and answering plaintiff's complaint, admits, denies and alleges as follows:

I.

Admits each and every allegation contained in paragraphs I, II, III and IV, of plaintiff's complaint.

II.

Admits that at the time and place in said complaint alleged, it was the duty of the defendant Southern Pacific Company, a corporation, to furnish the plaintiff with reasonably safe equipment with which to perform his work.

III.

Denies generally and specifically each and every allegation contained in plaintiff's complaint not expressly admitted to be true [8] or denied for lack of knowledge, information or belief sufficient to enable it to answer in respect thereto.

IV.

Denies that by reason of any act or acts, fault, carelessness, omission or omissions upon the part of this answering defendant, its agents, servants or employees, that plaintiff William K. Carson sustained injuries or damages in the sum of Fifty Thousand Dollars ($50,000.00), or any other sum whatsoever, whether as alleged in plaintiff's complaint or otherwise or at all.

For a Second, Separate and Distinct Answer and Defense, This Answering Defendant Alleges:

That the plaintiff William K. Carson did not exercise ordinary care, caution or prudence in the premises to avoid said accident and for his own safety, and that the said accident and resultant injuries or damages, if any, by him sustained were proximately contributed to and caused by the failure of plaintiff to exercise ordinary care, caution or prudence in the premises to avoid said accident and for his own safety in the premises.

For a Third, Separate and Distinct Answer and Defense, This Answering Defendant Alleges:

That at the time of the injuries alleged in plaintiff's complaint, plaintiff was an employee of this answering defendant and was engaged in performing ordinary duties in connection with such employment as brakeman; that at the time of the alleged injuries as hereinbefore alleged, plaintiff assumed the hazards ordinarily incident to the duties to be performed by him in connection with his employment as a brakeman, and the injuries, if any, or damages, if any, by plaintiff sustained arose solely from the hazards which were ordinarily incident to the performance of plaintiffs duties as said employee, which hazards or dangers were apparent to plaintiff and anticipated by him prior to the time he commenced and during the time he was performing said duties, and which ordinary hazards by [9] reason of said facts were assumed by plaintiff at the time of the alleged injuries.

For a Fourth, Separate and Distinct Answer and Defense, This Answering Defendant Alleges:

That at the time of the accident alleged in plaintiff's complaint defendant furnished to plaintiff for use in per-

forming his duties a hardwood brake club of standard make and design, of a type in general use for the purpose intended, and manufactured by a reputable manufacturer; that at the time said brake club was furnished to plaintiff there was nothing about said club to indicate that it was in any way defective and that the defects, if any, in said club were latent and unknown to defendant and could not have been discovered by defendant by the use of ordinary care.

Wherefore, this answering defendant prays judgment for its costs.

C. W. CORNELL
O. O. COLLINS
MALCOLM ARCHBALD
JOHN R. ALLPORT
By O. O. Collins
Attorneys for Defendant Southern Pacific Company

Defendant Southern Pacific Company hereby demands a jury trial in the within matter.

C. W. CORNELL
O. O. COLLINS
MALCOLM ARCHBALD
JOHN R. ALLPORT
By O. O. Collins
Attorneys for Defendant Southern Pacific Company [10]

[Verified.] [11]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Jun. 3, 1947. [12]

[Minutes: Thursday, August 14, 1947]

Present: The Honorable Leon R. Yankwich for Paul J. McCormick, District Judge.

Setting for jury trial: Both Goodman, Esq., for plaintiff; John Allport, Esq., for defendant; Court orders trial set before Judge Ling on Aug. 27, 1947. [13]

[Title of District Court and Cause]

NOTICE OF TRIAL

To the Plaintiff Above Named, and to Hildebrand, Bills and McLeod, His Attorneys:

You, and Each of You, Will Please Take Notice that the above entitled matter has been set for trial by jury on the 27th day of August, 1947, at 10:00 A. M., in the District Court of the United States in and for the Southern District of California, Central Division, Judge Charles C. Cavanah, Presiding.

Dated: August 15, 1947.

C. W. CORNELL
O. O. COLLINS
MALCOLM ARCHBALD
JOHN R. ALLPORT
By John R. Allport
Attorneys for Defendant Southern Pacific Company [14]

Received copy of the within Notice of Trial this 18th day of August, 1947. Hildebrand, Bills and McLeod, by John M. Ennis, ea, Attorneys for Plaintiff.

[Endorsed]: Filed Aug. 18, 1947. [15]

[Minutes: Wednesday, August 27, 1947]

Present: The Honorable Chas. C. Cavanah, District Judge.

For jury trial; D. W. Brobst, Esq., for plaintiff; O. O. Collins, Esq., for defendant; Court orders that a jury be impaneled for this trial and clerk draws names of twelve jurors who take places in jury box, and are informed of the facts of the case by Attorney Brobst and examined for cause by the Court and Attorney Collins.

Frank Harold Lonsdale is excused by plaintiff and clerk draws name of Jos Patrick Quigley, who is examined for cause by the Court.

Robert Tufts Cass is excused by plaintiff and clerk draws name of Mary M. Long, who is examined for cause by the Court.

There being no further challenges the jurors now in the box are accepted and sworn as the jury for the trial of this cause, viz.:

THE JURY

1. Thos. Henry Sanders
2. Norman J. Adams
3. Geo. Christian Blessing
4. Agnes White Roberts
5. Ola J. Kerns
6. Jos. Patrick Quigley
7. Agnes Margaret Williams
8. Allan Douglas Bryan
9. Wm. S. Davis
10. Glen Moore
11. Mary M. Long
12. Martin Ernest Hall

Court orders that petit jurors present who were not impaneled for this trial are excused until notified.

Attorney Brobst, at 10:28 A. M., makes a statement to jury for plaintiff; and Attorney Collins at 10:30 A. M., makes opening statement to jury for def't.

Wm. Kent Carson, plaintiff, at 10:32 A. M., is called, sworn, and testifies for himself. Plf's Ex. 1 is admitted in evidence.

At 11:15 A. M. the Court admonishes the jury not to discuss this cause and declares a recess for 10 minutes.

At 11:30 A. M. court reconvenes herein and all being present as before, including the jury, Wm. Kent Carson, plaintiff, resumes the stand and testifies further. [16]

Daniel J. Byrne, Jr., at 11:37 A. M., is called, sworn, and testifies for plaintiff, and at 11:44 A. M., Volney C. Barnett is called, sworn, and testifies for plaintiff. At 11:48 A. M. court recesses until 2 P. M.

At 2 P. M. court reconvenes herein and all being present as before, including the jury, Court orders trial proceed.

Wilson D. Jacobs, at 2:01 P. M., is called, sworn, and testifies for plaintiff; and at 2:17 P. M. Dr. Chester Cornell McReynolds is called, sworn, and testifies for plaintiff.

At 2:45 P. M. Dr. Ross Sutherland is called, sworn, and testifies for defendant. At 3 P. M. court recesses for 10 minutes.

At 3:10 P. M. court reconvenes herein and all being present as before, including the jury, Volney C. Barnett, heretofore sworn, resumes the stand and testifies further. At 3:16 P. M. plaintiff rests.

Robert Adam Graham, at 3:18 P. M., is called, sworn, and testifies for defendant. Attorney Collins argues a point of law, Attorney Brobst argues a point of law, and Attorney Collins argues further.

At 3:42 P. M. the jury return into court and Court declares a recess in this trial until Aug. 28, 1947, at 10 A. M. [17]

[Minutes: Thursday, August 28, 1947]

Present: The Honorable Chas. C. Cavanah, District Judge.

For further jury trial; D. W. Brobst, Esq., for plaintiff; C. O. Collins, Esq., for defendant; jury present;

Court makes a statement re offer of proof.

Kenneth W. Knight is called, sworn, and testifies.

Robert Adam Graham, heretofore sworn, testifies further.

Deft's Ex. A, B, and C are admitted in evidence.

Leslie Arthur Estes is called, sworn, and testifies for defendant.

At 10:47 A. M. court recesses for ten minutes.

At 10:55 A. M. court reconvenes herein and all present as before, jury present, Court orders trial proceed. Defendant rests at 11:02 A. M. Plaintiff has no rebuttal.

Attorney Brobst argues to jury for plaintiff, Attorney Collins argues to jury for defendant in reply, and Attorney Brobst argues in reply.

At 11:45 A. M. Court admonishes the jury and declares a recess in this trial to 10 A. M., Aug. 29, 1947. [18]

[Title of District Court and Cause]

DEFENDANT'S OBJECTIONS TO PLAINTIFF'S REQUESTED INSTRUCTIONS

I.

Defendant Southern Pacific Company, a corporation, objects to plaintiff's unnumbered instruction or any request to the Court to instruct the Jury where plaintiff's contributory negligence and defendant's violation of a provision of the Safety Appliance Act are concurring proximate causes, the Federal Employers Liability Act requires plaintiff's contributory negligence be disregarded, for the reason that the instruction is not supported by any evidence or the pleadings that there was any violation of the Safety Appliance Act and assumes and decides as a matter of law that there was a violation of the Safety Appliance Act.

[Written]: Denied. Charles C. Cavanah, Judge.

II.

Defendant Southern Pacific Company, a corporation, objects to plaintiff's unnumbered instruction wherein the plaintiff requests the Court to instruct the Jury that it was the duty of the defendant [19] to provide employees a reasonably safe place within which to work, for the reason that the issue is not involved nor is it supported by any evidence.

[Written]: Denied. Charles C. Cavanah, Judge.

III.

Defendant Southern Pacific Company, a corporation, objects to plaintiff's unnumbered instruction quoting Sec. 51, Title 45—U. S. C. A., commencing with the phrase

"Every common carrier by railroad" and ending with the phrase "roadbed, works, boats, wharves, or other equipment" because it fails to take into consideration the question of contributory negligence (comparative negligence).

[Written]: Denied. Charles C. Cavanah, Judge.

IV.

Defendant Southern Pacific Company, a corporation, objects to plaintiff's unnumbered instruction wherein plaintiff requests instruction under the Federal Safety Appliance Act instructing the Jury it was an absolute duty to equip its cars with hand brakes and appliances, etc. and that such duty is absolute regardless of negligence on the part of the railroad company or negligence on the part of the plaintiff, for the reason that a violation of the Federal Safety Appliance Act is not involved nor is it supported by either the evidence or the pleading.

[Written]: Denied. Charles C. Cavanah, Judge.

V.

Defendant Southern Pacific Company, a corporation, objects to plaintiff's unnumbered instruction involving the Safety Appliance Act wherein plaintiff requests the Court again to instruct the Jury under the Safety Appliance Act with reference to the equipment they work with, efficient hand brakes, for the reason that there is no evidence to support such instruction nor is it supported by the pleading.

[Written]: Denied. Charles C. Cavanah, Judge.

VI.

Defendant Southern Pacific Company, a corporation, objects, to plaintiff's unnumbered instruction based on the

Safety Appliance Act wherein plaintiff requests Court to instruct the Jury that the [20] defendant was absolutely bound to keep and maintain the hand brakes in an efficient condition at all times, for the reason there is no evidence to support such an instruction nor is it supported by the pleadings.

[Written]: Denied. Charles C. Cavanah, Judge.

VII.

Defendant Southern Pacific Company, a corporation, objects to plaintiff's unnumbered instruction, last and final, wherein plaintiff requests the Court to instruct the Jury with reference to the Statute under the Federal Safety Appliance Act relating to hand brakes on railroad cars, for the reason that there is no evidence to support such instruction nor is it supported by the pleadings.

[Written]: Denied. Charles C. Cavanah, Judge.

Generally, defendant Southern Pacific Company, a corporation, objects to any instruction under the Safety Appliance Act requested by plaintiff, all of which are unnumbered, for the reason that the action is brought solely under the Federal Employers Liability Act, and that a brake club or brake stick is not an instrumentality coming under the Safety Appliance Act.

[Written]: Denied. Charles C. Cavanah, Judge.

C. W. CORNELL
O. O. COLLINS
MALCOLM ARCHBALD
JOHN R. ALLPORT
By O. O. Collins
Attorneys for Defendant Southern Pacific Company

[Endorsed]: Filed Sep. 10, 1947. [21]

[Title of District Court and Cause]

DEFENDANT'S REQUESTED INSTRUCTIONS

Comes now the defendant Southern Pacific Company, a corporation, and requests the Court to instruct the jury as follows: [22]

Defendant's Instruction No. I

The Court instructs the jury to find the issues in favor of and return a verdict in favor of the defendant, the Southern Pacific Company.

Given:
Given as Modified:
Refused: Refused

Charles C. Cavanah, Judge [23]

Defendant's Instruction No. II

In case the Court refuses to give the foregoing instruction, then and in that event only, defendant requests each of the following instructions.

Given:
Given as Modified:
Refused: Refused

Charles C. Cavanah, Judge [24]

Defendant's Instruction No. III

The instructions which I am about to read to you are the instructions of the Court and you are expected and required under the law to follow the same. It is your duty to consider, not one of these instructions, but all of them together, and to construe them together for the purpose of definitely ascertaining the law upon the ques-

tions now submitted to you. It is further the duty of the Court to instruct you upon all phases of the law which apply to any fact or circumstances which is in evidence and upon which you may find, regardless of what the Court thinks the weight of evidence shows.

You are the sole and exclusive judges of what the facts are. It is for you to judge of the credibility of the witnesses and to determine what the truth is. Having ascertained what the facts are, it is further your duty then to arrive at your verdict in accordance with that law and those facts, without passion, or prejudice, speculate or sympathy for either party.

Given: Covered in general instruction
Given as Modified:
Refused:

Charles C. Cavanah, Judge [25]

Defendant's Instruction No. XI.

You are instructed that reasonable care in the matter of inspection requires the defendant to make such examinations and tests as a reasonably prudent man would deem necessary under the same or similar circumstances for the discovery of defects. The defendant is not required, unless put upon notice as to any probable existence of defects, to employ unusual or extraordinary tests, nor even to use the latest and most improved methods of testing its tools. ~~If you believe from the evidence that the Southern Pacific Company used the same degree of care which persons of ordinary intelligence and prudence, engaged in the same kind of business, commonly exercised under like circumstances in the inspection of its tools, then, and in that event, I~~

~~instruct you that the Southern Pacific Company is not guilty of any actionable negligence and your verdict should be for the defendant.~~ [Written]: Out.

39 C. J. 424, 425, Sections 541, 542;

Canadian Northern Ry. Co. v. Senske, 201 F. 637;

Lowden v. Hanson, 134 F. (2d) 348;

Siegel v. Detroit, G. H. & M. R. Co., 160 Mich. 270; 125 N. W. 6;

Stoutimore v. Atchison, T. & S. F. R. Co., 338 Mo. 463; 92 S. W. (2d) 658;

35 Am. Juris. 573, Sec. 141;

Lowden v. Hanson, 134 F. (2d) 348.

Given:
Given as Modified: √
Refused:

Charles C. Cavanah, Judge [26]

Defendant's Instruction No. XII

You are instructed that the defendant, the Southern Pacific Company, is not liable for those risks which it could not avoid in the observance of its duty of due care.

In applying the above principle in this case, while it is true that the plaintiff did not assume the risks of danger in his employment, nevertheless, he can only recover in this case by proving by a preponderance of the evidence that the defendant, the Southern Pacific Company, through its agents, servants, or employees, was guilty of negligence, which, in whole or in part, proximately caused the accident and any injuries or damages resulting therefrom, and if you find from a preponderance

of the evidence that the dangers, if any, to which the plaintiff was subjected, and which caused his injuries, if any, could not have been avoided by the defendant, the Southern Pacific Company, in the exercise of reasonable care, then the plaintiff is not entitled to recover against the defendant, and you should return a verdict in favor of the defendant.

Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54-73; 87 L. Ed. 610.

Given:
Given as Modified:
Refused: Refused

Charles C. Cavanah, Judge [27]

Defendant's Instruction No. XIII

You are instructed that the defendant is not an insurer of the safety of its employees, ~~and that before the plaintiff can recover in this case, he must prove by a preponderance of the evidence that the defendant has been guilty of negligence that proximately contributed to his accident and any damages sustained by him.~~ [Written]: Out.

Given:
Given as Modified: As modified
Refused:

Charles C. Cavanah, Judge [28]

Defendant's Instruction No. XV

You are instructed that the term "latent defect" means a defect that is not visible or apparent; a hidden defect; it applies to that which is present without manifesting itself; ~~it cannot be discovered by mere observation.~~ [Written]: Out.

Given:
Given as Modified: As modified
Refused:

Charles C. Cavanah, Judge [29]

Defendant's Instruction No. XVI

The law does not permit you to guess or speculate as to the cause of the accident in question. If the evidence is equally balanced on the issue of negligence or proximate cause, so that it does not preponderate in favor of the party making the charge, then he or she has failed to fulfill his or her burden of proof. ~~To put the matter in another way, if after considering all the evidence, you should find that it is just as probable that either the defendant was not negligent, or if it was, its negligence was not a proximate cause of the accident, as it is that some negligence on his part was such a cause, then a case against the defendant has not been established.~~ [Written]: Out.

B. A. J. I. No. 132, Third Revised Edition.

Given:
Given as Modified: As modified
Refused:

Charles C. Cavanah, Judge [30]

Defendant's Instruction No. XXI

In law we recognize what is termed an unavoidable or inevitable accident. These terms do not mean literally that it was not possible for such an accident to be avoided. They simply denote an accident that occurred without having been proximately caused by negligence. ~~Even if such an accident could have been avoided by the exercise of exceptional foresight, skill or caution, still, no one may be held liable for injuries resulting from it.~~ [Written]: Out.

B. A. J. I., Third Revised Edition No. 134.

Given:
Given as Modified: As modified
Refused:

Charles C. Cavanah, Judge [31]

Defendant's Instruction No. XXII

You are instructed that in civil cases, such as this is, a preponderance of the evidence is required in order for the plaintiff to be entitled to recover; i. e., such evidence as, when weighed with that opposed to it, ~~has more convincing force and from which it results that the greater probability is in favor of the party upon whom the burden rests. The burden of proof rests upon the plaintiff to prove and establish all of the controverted material allegations of his complaint by a preponderance of the evidence; and if you find that the plaintiff has not sustained this burden of proof or if you find that the evidence is evenly balanced or that it preponderates~~

~~in favor of the defendant, the Southern Pacific Company, then the plaintiff cannot recover from the defendant, the Southern Pacific Company, and in such case your verdict will be in favor of the defendant.~~

[Written]: Out.

Given:

Given as Modified: As modified

Refused:

Charles C. Cavanah, Judge [32]

Defendant's Instruction No. XXIII

You are instructed that you may not speculate as to whether the defendant, the Southern Pacific Company, was negligent with respect to any matters shown in connection with the alleged injury to plaintiff; but such negligence, if any, must be proved by the plaintiff by a preponderance of the evidence, and if the evidence leaves the real cause of the alleged injuries to plaintiff as a matter of conjecture or doubt, then your verdict shall be in favor of the defendant and against the plaintiff.

Patton v. Texas R. Co., 179 U. S. 655; 45 L. Ed. 361;

Shaff v. Perry, 232 Pac. 407.

Given:

Given as Modified:

Refused: Refused

Charles C. Cavanah, Judge [33]

Defendant's Instruction No. XXIV

You are instructed that if you believe from the evidence that the brake club in question was purchased from a reputable manufacturer then the railroad company cannot be charged with negligence because of any structural or inherent defects which was not patent at the time the club was delivered to the plaintiff for his use.

Lowden v. Hanson, 134 F. 2d 348, 351.

Given:
Given as Modified:
Refused: Refused

Charles C. Cavanah, Judge [34]

Defendant's Instruction No. V-A

In law we recognize what is termed an unavoidable or inevitable accident. These terms do not mean literally that it was not possible for such an accident to be avoided. They simply denote an accident that occurred without having been proximately caused by negligence. (Even if such an accident could have been avoided by the exercise of exceptional foresight, skill or caution, still, no one may be held liable for injuries resulting from it.)

[Written]: Given as modified. Charles C. Cavanah.

See other offered

Given:
Given as Modified: √
Refused:

Charles C. Cavanah, Judge [35]

Defendant's Instruction No. V-D

You are instructed that it was the duty of the railroad company to use ordinary care in the selection and purchase of brake clubs to be furnished to its employees.

If you find from the evidence that such care was used with respect to the brake club involved in this accident, then it was not negligent in this respect.

Given:
Given as Modified:
Refused: √

Charles C. Cavanah, Judge [36]

Defendant's Instruction No. V-E

The evidence in this case established that the brake clubs are furnished to its employees by the defendant company. Under such circumstances it was the company's duty to use ordinary care in the examination and inspection of the clubs before they were made available.

If you believe from the evidence that the railroad company used such care with respect to the brake club involved in this accident, then it was not negligent in this respect.

Given:
Given as Modified:
Refused: √

Charles C. Cavanah, Judge [37]

Defendant's Instruction No. IX (a)

You are instructed that if you believe from the evidence that the brake club used by the plaintiff was purchased by the Southern Pacific Company from a manu-

facturer of recognized standing then it had the right to assume that in the manufacture thereof proper care was taken and that proper tests were made and that as delivered to the Southern Pacific Company it was in a fair and reasonable condition for use.

Richmond and Danville Railroad Company, plaintiff in error, vs. Henry Elliott, 149 U. S. 265, 266 at 273.

37 Law Edition, 728 at 732.

Lowden v. Hanson, 134 F. 2d 348, 351.

[Written]: Refused

Charles C. Cavanah, Judge

Given:
Given as Modified:
Refused: Refused

Charles C. Cavanah, Judge [38]

Def. Requested Ins. No. 9, B

You are instructed that one who purchases an instrumentality from a manufacturer of recognized standing then he has the right to assume that in the manufacture thereof proper care was taken and proper tests were made and that when it was delivered it was in a fair and reasonable condition for use unless there was some apparent patent defect in the instrumentality which reasonable inspection ~~and~~ or test would disclose.

Refused

Charles C. Cavanah, Judge

[Endorsed]: Filed Sep. 10, 1947. [39]

[Minutes: Friday, August 29, 1947]

Present: The Honorable Chas. C. Cavanah, District Judge.

For further jury trial; D. W. Brobst, Esq., for plaintiff; O. O. Collins, Esq., for defendant; and jury being present; Court instructs the jury on the law. At 10:55 A. M. Frank Mefferd is sworn as an officer to take charge of the jury during its deliberation upon a verdict and the jury retires to deliberate.

Thereupon, counsel for both sides confirm objections previously taken to ruling of Court, declining to give instructions requested, and giving instructions objected to; and both sides agree that verdict may be received in the absence of counsel, and that in the event verdict is rendered in favor of the plaintiff, that defendant be allowed a stay for 10 days after entry of judgment; or 10 days after ruling of Court denying motion for a new trial if said motion is made.

At 11:42 A. M. Court orders that the jury be taken to lunch at noon, if they so desire, without any further order of Court.

At noon Frank Turner is also sworn as an officer to take charge of the jury, and the jury in company of both officers go to lunch.

At 2 P. M. jury return and resumes deliberation.

At 3 P. M. jury return into court and plaintiff being present, his attorney being absent, and counsel for defendant being present; jury presents verdict which is read and ordered filed and entered herein, to-wit:

* * * * * * * * * [40]

[Title of District Court and Cause]

VERDICT OF THE JURY

We, the jury in the above entitled case, find the issues in favor of the plaintiff, and assess his damages in the sum of Eighty Five Hundred Dollars ($8,500).

Dated: Los Angeles, Calif., August 29th, 1947.

GLEN MOORE
Foreman of the Jury

[Endorsed]: Filed Aug. 29, 1947. [41]

In the District Court of the United States for the Southern District of California
Central Division

No. 6950-M

WILLIAM K. CARSON,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a corporation,

Defendant.

JUDGMENT

This cause came on for trial before the court and a jury on August ~~20~~ 27th, 1947, both parties appearing by counsel, and the issues having been duly tried, and the Jury having rendered a verdict for the plaintiff.

It Is Hereby Ordered, Adjudged and Decreed that plaintiff have judgment against the defendant in the sum

of Eight Thousand Five Hundred ($8,500.00) Dollars, together with costs herein taxed at $76.40.

Dated: This 4th day of September, 1047.

CHARLES C. CAVANAH
Judge of the ~~Superior Court~~ United States District Court

Approved as to Form: Cornell, Collins, Archbald & Allport, by O. O. Collins, Attorneys for Defendant.

Judgment entered Sep. 4, 1947. Docketed Sep. 4, 1947. C. O. Book 45, page 271. Edmund L. Smith, Clerk; by J. M. Horn, Deputy. [42]

Received copy of the within Judgment this 3rd day of September, 1947. C. W. Cornell, by ARH, Attorney for Defendant.

[Endorsed]: Filed Sep. 4, 1947. [43]

[Title of District Court and Cause]

MOTION FOR NEW TRIAL

Comes now the defendant and moves the Court for a new trial of the above entitled action upon the following grounds:

1. Errors in law occurring at the trial.
2. Insufficiency of evidence to justify the verdict as a whole.
3. Insufficiency of the evidence to justify the amount of the verdict.

The errors relied upon in support of this motion are as follows:

(a) The Court erred in charging the Jury at the request of plaintiff in the three following instructions as follows. If you find from a preponderance of the evidence that the hand brake on the tank car in question would not operate efficiently without the use of a [44] brake club, and if you find further from a preponderance of the evidence that the brake club in question was a necessary part of the hand brake on the tank car, then and in that event only, you may apply the following instructions.

(b) Where plaintiff's contributory negligence and defendant's violation of a provision of the Safety Appliance Act are concurring proximate causes, the Federal Employers' Liability Act requires plaintiff's contributory negligence, if any, be disregarded.

(c) The Federal Safety Appliance Act imposes upon the railroad carrier an absolute duty to equip its cars with hand brakes and appliances prescribed in the Act and to equip and maintain such hand brakes in an efficient condition; and the liability for failure to maintain efficient hand brakes is absolute, regardless of negligence on the part of the railroad company or contributory negligence on the part of the plaintiff.

(d) And the Court erred in modifying the defendant's requested Instruction No. XI, the Instruction as requested, is as follows: "You are instructed that reasonable care in the matter of inspection requires the defendant to make such examinations and tests as a reasonably prudent man would deem necessary under the same or similar circumstances for the discovery of defects. The defendant is not

required, unless put upon notice as to any probable existence of defects, to employ unusual or extraordinary tests, nor even to use the latest and most improved methods of testing its tools. If you believe from the evidence that the Southern Pacific Company used the same degree of care which persons of ordinary intelligence and prudence, engaged in the same kind of business, commonly exercised under like circumstances in the inspection of its tools, then, and in that event, I instruct you that the Southern Pacific Company is not guilty of any actionable negligence and your verdict should be for the defendant."

The Instruction as modified and given by the Court: [45] "If you believe from the evidence that the Southern Pacific Company used the same degree of care which persons of ordinary intelligence and prudence, engaged in the same kind of business, commonly exercised under like circumstances in the inspection of its tools, then, and in that event, I instruct you that the Southern Pacific Company is not guilty of any actionable negligence and your verdict should be for the defendant."

(e) The Court also erred in refusing to give the following Instruction requested by the defendant. You are instructed that one who purchases an instrumentality from a manufacturer of recognized standing then he has the right to assume that in the manufacture thereof proper care was taken and proper tests were made and that when it was delivered it was in a fair and reasonable condition for use unless there was some apparent patent defect in the instrumentality which reasonable inspection and test would disclose.

(f) That the Court erred in giving the following instruction upon its own initiative:

"You are further instructed that one who purchases an instrumentality from a manufacturer is justified in assuming that in the manufacture thereof proper care was taken and proper tests were made of the different parts of the instrumentality and that as delivered to him it is in a fair and reasonable condition for use, but it is never the duty of a purchaser not to make tests or examination of his own or that he can always and wholly rely upon the assumption that the manufacturer has fully and sufficiently tested it."

This motion is based upon the pleadings and papers on file, the minutes of the Court, the reporter's shorthand notes or transcript thereof, and upon the entire record in the case.

Dated this 5th day of September, 1947.

C. W. CORNELL
O. O. COLLINS
MALCOLM ARCHBALD
JOHN R. ALLPORT
By O. O. Collins
Attorneys for Defendant Southern Pacific Company [46]

Received copy of the within Motion for New Trial this 5th day of September, 1947. Hildebrand, Bills and McLeod, by John M. Ennis, Per F., Attorneys for Plaintiff.

[Endorsed]: Filed Sep. 5, 1947. [47]

[Minutes: Wednesday, September 10, 1947]

Present: The Honorable Wm. C. Mathes, District Judge.

For hearing defendant's motion for new trial, filed Sept. 5, 1947; D. W. Brobst, Esq., for plaintiff; O. O. Collins, Esq., for defendant;

Attorney Collins presents said motion and Attorney Brobst replies to it.

Court orders said motion denied. Defendant notes an exception to the ruling. [48]

[Title of District Court and Cause]

NOTICE OF DENIAL OF MOTION FOR NEW TRIAL

To the Above Named Defendant, and C. W. Cornell, O. O. Collins, Malcolm Archbald and John R. Allport, Attorneys for Defendant:

You are hereby notified that on the 10th day of September, 1947, the above entitled court made its order denying the defendant's Motion for New Trial.

Dated: September 17th, 1947.

HILDEBRAND, BILLS & McLEOD

By [Illegible]

Attorneys for Plaintiff [49]

Received copy of the within this 19 day of September, 1947. C. W. Cornell, /J.C., Attorney for Defendant.

[Endorsed]: Filed Sep. 19, 1947. [50]

[Title of District Court and Cause]

NOTICE OF APPEAL

Notice is hereby given that the above named defendant Southern Pacific Company, a corporation, hereby appeals to the United States Circuit Court of Appeals for the Ninth (9th) Circuit from the final judgment and the whole thereof entered in this court on or about the fourth (4th) day of September, 1947.

C. W. CORNELL
O. O. COLLINS
MALCOLM ARCHBALD
JOHN R. ALLPORT

By John R. Allport

Attorneys for Defendant Southern Pacific Company

Received copy of the within Notice of Appeal this 20 day of Sept., 1947. John M. Ennis, Attorney for Plaintiff.

[Endorsed]: Filed Sep. 22, 1947. [51]

[Title of District Court and Cause]

STIPULATION WAIVING BOND ON APPEAL

It Is Hereby Stipulated that bond on appeal (cost bond) Rule 73C and supersedeas bond (stay of execution bond on appeal), Rule 73D, is hereby waived.

That execution on the judgment entered in the above entitled matter is the sum of $8,500.00 and costs shall be stayed during the pendency of and until the final determination of the appeal in the above entitled matter.

This stipulation is made and entered into in lieu of the posting of any bond or bonds by the defendant Southern Pacific Company, a corporation, provided for under Federal Rules of Procedure, Title 28, Rule 73C and Rule 73D or otherwise.

HILDEBRAND, BILLS & McLEOD
By John M. Ennis
Attorneys for Plaintiff

C. W. CORNELL
O. O. COLLINS
MALCOLM ARCHBALD
JOHN R. ALLPORT
By John R. Allport
Attorneys for Defendant Southern Pacific Company

[Endorsed]: Filed Sep. 22, 1947. [52]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 57, inclusive, contain full, true and correct copies of Complaint for Damages; Summons and Return of Service; Answer of Defendant Southern Pacific Company and Demand for Jury Trial; Minute Order Entered August 14, 1947; Notice of Trial; Minute Orders Entered August 27 and 28, 1947; Defendant's Objections to Plaintiff's Requested Instructions; Defendants Requested Instructions Refused or Modified; Minute Order Entered August 29, 1947; Verdict of the Jury; Judgment; Motion for New Trial; Minute Order Entered September 10, 1947; Notice of Denial of Motion for New Trial; Notice of Appeal; Stipulation Waiving Bond on Appeal; Designation of Record and Affidavit of Service which, together with copy of reporter's transcript of proceedings on August 27, 28 and 29, 1947 and original plaintiff's exhibit 1 and original defendant's exhibits A, B, and C, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to $15.50 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 28 day of October, A. D. 1947.

(Seal) EDMUND L. SMITH
Clerk

By Theodore Hocke,
Chief Deputy Clerk

[Title of District Court and Cause]

Honorable Charles C. Cavanah, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California, August 27, 28, 29, 1947

Appearances:

For the Plaintiff: Hildebrand, Bills & McLeod, 1212 Broadway, Oakland 12, California; by D. W. Frost, Esq.

For the Defendant: O. O. Collins, Esq., 670 Pacific Electric Building, Los Angeles 14, California.

Los Angeles, California; August 27, 1947;
10:00 O'Clock A. M.

The Court: Are you ready in the case set for this morning?

Mr. Brobst: Yes, your Honor.

Mr. Collins: Yes, your Honor.

The Court: You may call the jury.

(At this point the following jury of 12 were duly impaneled and sworn:)

1. Thomas Henry Sanders
2. Norman J. Adams
3. George Christian Blessing
4. Agnes White Roberts
5. Ola J. Kerns
6. Joseph Patrick Quigley
7. Agnes Margaret Williams
8. Allan Douglas Bryan
9. William S. Davis
10. Glen Moore
11. Mary M. Long
12. Martin Ernest Hall

The Court: You may make an opening statement.

Mr. Collins: Your Honor, I would like to invoke the rule that all witnesses be excused from the courtroom until the time they are called to testify.

The Court: All witnesses in the case on either side are excused from the courtroom until you are called as witnesses until the evidence is closed.

OPENING STATEMENT IN BEHALF OF THE PLAINTIFF

Mr. Brobst: If the Court please, and ladies and gentle- [4*] men of the jury: This is an action brought by the plaintiff under what is known as the Federal Employers Liability Act. The evidence will show that the plaintiff was employed by the defendant Southern Pacific Company and at the time of his accident or injury he was working out in their yards in Tucson, Arizona. They were at that time making a switching movement. I presume that is what it will be. What they were doing was taking cars off from a train and putting them on a track. It was the plaintiff's duty to go in and set the brakes so that these cars would remain stationary. Then they would go out and get some more cars and bring them in, and he would set the brakes so that that cut of cars would remain stationary. I believe in railroad terms, the evidence will show, they call it tying down the cars.

At any rate, the plaintiff in this particular instance was riding in a cut of cars and it was his duty to tie down the cars, and the particular type of brake that he was operating, although it was a hand brake, he was required to use a club to set it. They call it a brake club. It will be described to you more in detail from the witness stand.

*Page number appearing at top of page of original Reporter's Transcript.

Now these brake clubs are supplied to these men working on these cars by the supply department of the Southern Pacific Company. I believe the evidence will show that they have a can that sits outside the supply department and when the men need a club they go out and select one out of the can and [5] go out and do their work. As I say, although these brakes are what are known as hand brakes, they require a club to operate them.

On this particular occasion, as this man was setting the hand brake, the club just broke right in half and it threw him around against the end of the car and he received an injury to his back, which will be described to you by the medical men.

I believe that the evidence will show that there was an injury in the vicinity of his fifth lumbar and also to the muscles in his back, the fifth lumbar vertebrae. This injury to his back has caused him trouble ever since the time of his accident, and although he has gone back to work he has only been able to work intermittently, or two or three days at a time and then he has to lay off because of this injury to his back.

The accident happened back in February of this year and he has lost completely a total of approximately six months of work.

The Court: You may proceed.

Mr. Collins: Do you wish a statement from the defense?

The Court: I will leave that with you. You can make it now or you can make it later on.

Mr. Collins: I think I had better make it now.

The Court: Very well. [6]

OPENING STATEMENT ON BEHALF OF THE DEFENDANT

Mr. Collins: Ladies and gentlemen of the jury: There isn't any question but what the brake club broke. I have it here in court. I expect to show from the evidence that these brake clubs are purchased from a reputable firm, a firm which is engaged in the manufacture of brake clubs.

I expect to show you that the brake club when received by us had the usual inspection, that the brake club itself shows no flaws whatsoever, that the brake club could not have been broken except by the exertion of a force upon the brake club which was abnormal. The brake club has been tested, showing what the tensile strength is, and that it was bought from a reputable firm which, if you believe, the Court will in all probability say to you that that is a defense to this action.

The Court: You may proceed.

Mr. Brobst: Mr. Carson.

WILLIAM KENT CARSON,

called as a witness in his own behalf, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: William Kent Carson.

Direct Examination

By Mr. Brobst:

Q. While you are up there, Mr. Carson, just speak up [7] so that all the jurors and the judge can hear.

What is your name, please?

A. William Kent Carson.

Q. Where do you live, Mr. Carson?

A. 114 North Jacobus, in Tucson, Arizona.

(Testimony of William Kent Carson)

Q. How old are you, Mr. Carson?

A. Twenty-five.

Q. Now back in February of this year. what was your business or occupation? A. Yardman.

Q. For what company were you employed?

A. Southern Pacific.

Q. How long had you been working for them prior to the second day of February of this year?

A. A little over two years.

Q. What are the duties generally of a yardman?

A. There is all different things; you use them as headers and they switch cars out.

Q. You do general switching work in the yard, is that about what it covers? A. Yes, sir.

Q. What was the date that the accident in which you received your injury occurred? A. February 2nd.

Q. Of what year? [8] A. 1947.

Q. Where did that accident take place?

A. Tucson, Arizona.

Q. In what yard there? A. North yard.

Q. What time did you come to work the day of the accident? A. 7.59.

Q. In the morning? A. Yes, sir.

Q. What time did the accident occur?

A. About 10:50.

Q. That was also in the morning? A. Yes, sir.

Q. What type of work were you doing at the time that the accident happened?

A. I was switching a cut of cars out.

Q. How many cars were there in the particular cut that you were switching? A. Three cars.

(Testimony of William Kent Carson)

Q. What were the three cars, if you recall?

A. There was a boxcar and two tank cars.

Q. On which of the three cars were you riding?

A. I was riding the rear tank car.

Q. The rear tank car? [9] A. Yes, sir.

Q. What was the car that was furthest away from you? A. The boxcar.

Q. Then the next one towards you was what?

A. A tank car.

Q. Then the one you were on was also a tank car?

A. A tank car.

Q. What was your duty with relation to that particular cut of cars?

A. I was to ride the cut of cars in the clear and tie it down and see that it stayed there.

Q. What do you mean by tying it down?

A. I was to wind the brake up and see that the car stayed there on the track.

Q. On this particular car, what type of a brake was it? A. Staff brake.

Q. Is that what is called a hand brake?

A. That is a hand brake but you are required to use a club.

Q. It is a hand brake but you have to use a club?

A. Yes, sir.

Q. Now did you have a club with you that you were tying this car down with? A. Yes, sir.

Q. Where had you gotten that club? [10]

A. From the front of the yard office. They have a can in front of the yard office and I got it out of there.

Q. When had you gotten the club?

A. I got it that morning, 7:59, before I went to work.

(Testimony of William Kent Carson)

Q. Is that something that is necessary to have with you? A. Yes, sir.

Q. Why?

A. That is a hill yard and you need a club to tie the brakes down.

Q. It was what kind of a yard?

A. It is a hill yard. There is a kind of a grade there and you need a club to tie the brakes down.

Q. Can you tie them securely enough by hand so that they will stay, or is it necessary to use this brake?

Mr. Collins: That is objected to as calling for a conclusion of the witness, unless he made an actual test.

The Court: That calls for a conclusion. Objection sustained. You are asking his opinion. Let him state the facts.

By Mr. Brobst:

Q. On this particular car, state whether or not it was necessary to use a club to hold the car fast.

Mr. Collins: Same objection, if your Honor please.

The Court: That calls for an opinion. He can state [11] what was done and describe everything there. You are asking him his opinion, counsel.

Mr. Brobst: I am asking him to state whether or not it was necessary.

Mr. Collins: That calls for an opinion. What did he do? Did he try it beforehand?

The Court: I am afraid that that calls for an opinion. He can state what the custom is. what they had been doing, and all that.

By Mr. Brobst:

Q. What were you using to make the brake hold?

A. A brake club.

(Testimony of William Kent Carson)

Q. Would the brake hold by the use of your hands?

A. No. sir.

Mr. Collins: That is objected to as calling for a conclusion and opinion of the witness. and I move that the answer be stricken.

The Court: Objection sustained. That is asking if a certain event would have happened if a certain thing was not done. That is calling for his opinion. He can state the facts as to what occurred and how it was done and he can leave that to the Court and jury whether it was necessary under the facts or whether it would not have happened.

By Mr. Brobst:

Q. Was the track that you were setting these cars out [12] on, was that a level track or was it on an incline? A. It was on a grade.

Q. Which way was the grade, in the direction in which the move was being made or was it back in the direction you were riding?

A. It was back in the direction from which I had been riding.

Q. So that the cars actually were to be tied down on a grade? A. Yes, sir.

Q. Now had you on previous occasions tied down cars that were set on that grade? A. Yes, sir.

Q. In your past experience, state whether or not it was necessary to use a brake club to hold the cars.

Mr. Collins: Just a moment. I would like to ask a question on voir dire.

The Court: You may do so.

(Testimony of William Kent Carson)

Voir Dire Examination

By Mr. Collins:

Q. That was on different cars, not this particular car?

A. What is that?

The Court: He asked you what experience you have had in the past. Was it on different cars than this one that you [13] had that day?

The Witness: Yes. That is the first time I drove that car.

Mr. Collins: Objected to as incompetent, irrelevant and immaterial.

The Court: Did the cars you used on previous occasions, were they larger cars than the one on this occasion?

The Witness: Yes, sir.

The Court: Overruled.

Direct Examination (Continued)

Mr. Brobst: Will you read the question, Mr. Reporter?

(The question referred to was read by the reporter as follows):

("Q. In your past experience, state whether or not it was necessary to use a brake club to hold the cars.")

The Witness: On some cars where they have a staff brake we have to use a brake club to hold the cars on the track.

The Court: This question comes after the Court had inquired. At the time it was asked him he hadn't made the facts known as to the Court's ruling to warrant the answer. But this question, as I understand, now comes in after he further testified when he was asked by the Court?

(Testimony of William Kent Carson)

Mr. Brobst: Yes, sir.

The Court: Let the record so show.

Mr. Brobst: Let the record show that the question was [14] re-propounded.

The Court: Any objection to that?

Mr. Collins: No objection.

Mr. Brobst: After the examination on voir dire.

The Court: Yes.

By Mr. Brobst:

Q. The particular type of brake that you were operating was a staff brake? A. Yes, sir.

Q. And in your past experience operating that type of brake on that particular track there, could you tie the cars down operating that brake by hand?

Mr. Collins: That is objected to on the ground it has been asked and answered. If I remember the answer correctly to the question that was re-propounded, he said that on some he did and on some he did not. If the reporter will read the answer I think you will find that that is correct.

(The record referred to was read by the reporter as follows):

("Q. In your past experience, state whether or not it was necessary to use a brake club to hold the cars.

("A. On some cars where they have a staff brake we have to use a brake club to hold the cars on the track.")

The Court: He has answered it, counsel. Counsel has objected because it is repetition now. [15]

Mr. Brobst: I am asking the other way, whether or not they could be held by hand, that is all. It isn't repetition, your Honor.

The Court: Overruled. I see your point.

(Testimony of William Kent Carson)

The Witness: You mean the same cars?

By Mr. Brobst:

Q. The same type of brake.

A. With the same brake?

Q. Yes. A. No.

Q. Now as you attempted to tie down this car at this particular time, just tell what happened.

A. I was tying the brake down and the brake club broke and threw me against the end of the tank.

Q. Where did you say you got the brake club?

A. From the front of the yard office, the brake club can.

Q. Just describe the brake club if you will, please.

A. It is a piece of wood made out of hickory, about 32 inches long, and it is round at one end and it is tapered down at the other end.

Mr. Brobst: I believe counsel stated he had the brake club here. We could show it and the jury would get a better idea of it than to have him describe it.

Mr. Collins: Yes, I have it here. [16]

Mr. Brobst: Have you any objection to doing that?

Mr. Collins: Not at all. But before introducing it, I merely want to establish that it was that particular brake club.

Mr. Brobst: That is all right. I merely want to show what it looks like.

Mr. Collins: I think you will find the plaintiff's name inscribed on that brake club where he signed it after the accident.

Mr. Brobst: Do you want me to introduce it? I will ask him if it is.

Mr. Collins: Certainly.

(Testimony of William Kent Carson)

By Mr. Brobst:

Q. Is this the brake club that you were using the morning of the accident?

A. (Examining brake club). Yes, it is.

Mr. Collins: I think if you examine it you will find that there are four names appearing on it in addition to the plaintiff's.

Mr. Brobst: We will offer it in evidence, your Honor, at this time, eliminating the names that are written on it. I don't know what the purpose of those names is.

Mr. Collins: For the identification of the club as being the one that he was using.

Mr. Brobst: That is the one he was using, so that is [17] all right. We will offer it in evidence.

The Court: Admitted.

The Clerk: Plaintiff's Exhibit No. 1 in evidence.

(The brake club referred to was received in evidence and marked Plaintiff's Exhibit No. 1.)

By Mr. Brobst:

Q. Now, Mr. Carson, you say it threw you around against the car when it broke? A. Yes, sir.

Q. And then what did you do?

A. After it threw me around?

Q. For instance, first what part of your body struck the tank car?

A. The lower left part of my back.

Q. Were you thrown to the ground?

A. No, sir.

Q. What did you do right after that, after it broke?

A. The foreman was there and I told him—he seen what happened and he asked me if I was hurt bad, and

(Testimony of William Kent Carson)

I told him I was hurting all over my back, I had a pain all over my back.

Q. Did you finish your shift? A. No, sir.

Q. Where did you take the brake club?

A. The foreman took it over to the general yard-master.

Q. Then did you go over to see the general yard-master? A. Yes, sir.

Q. From there where did you go? [18]

A. I went down to the Southern Pacific Hospital in Tucson, Arizona.

Q. How were you taken down there?

A. I was taken down there by a messenger.

Q. In an automobile? A. Yes, sir.

Q. Did you see a Southern Pacific doctor down there?

A. No, sir.

Q. Who did you see?

A. Not until the next day.

Q. The next day? A. Yes, sir.

Q. What did they do when you went to the hospital at Tucson the first time?

A. They took pictures of me.

Q. X-rays? A. They took X-rays.

Q. Did they give you any treatment at all?

A. No, sir.

Q. What did they do with you?

A. They told me to go home and come back the next day.

Q. What did you do when you went home?

A. I went home and went to bed.

Q. Did you go back to the hospital the next day?

A. Yes, sir. [19]

(Testimony of William Kent Carson)

Q. Did some company doctor then see you?

A. Yes, sir.

Q. What treatment, if any, did he give you?

A. He gave me physiotherapy and diathermy.

Q. Wree you suffering any pain? A. Yes, sir.

Q. Where was that located?

A. It was located in the left part of my back.

Q. How long did you receive treatment from the doctor at Tucson?

A. On and off for about six months.

Q. About six months? A. Yes, sir.

Q. How often did you see the doctor at Tucson?

A. About once a week.

Q. Were you hospitalized at any time?

A. Only when I went over to San Francisco.

Q. That is what I am getting at. You were sent to what hospital?

A. San Francisco General Hospital.

Q. Is that the Southern Pacific General Hospital?

A. Southern Pacific General Hospital.

Q. When were you sent up there? A. In May.

Q. You were treated from February until May by the [20] local doctor at Tucson? A. Yes, sir.

Q. And then in May you were sent to the Southern Pacific General Hospital in San Francisco?

A. Yes, sir.

Q. How long were you there?

A. Three weeks.

Q. What type of treatment did they give you up there?

A. They gave me heat treatments and massage.

(Testimony of William Kent Carson)

Q. Were you able to do any work between the 2nd of February and up and through May when you were sent to the General Hospital?

Mr. Collins: That is objected to as calling for a conclusion of the witness. That is a matter calling for expert testimony. It is proper for him to say whether he did any work, or whether he did not, but as to his capabilities that is a matter of expert testimony.

Mr. Brobst: All right.

Q. Did you do any work? A. No, sir.

Q. Why not?

Mr. Collins: That is objected to on the ground it is calling for a conclusion of the witness unless it is limited to the question whether or not he suffered pain when he attempted to work. [21]

The Court: It is going into an opinion, bearing on an opinion about his condition. You can ask him what he did and how he operated.

Mr. Brobst: The question is why he didn't go back to work.

The Court: He may answer that.

The Witness: Because my back was hurting.

By Mr. Brobst:

Q. Just describe how your back hurts, if you will.

A. Well, it hurts whenever I lay down in a soft bed. A lot of times when I am standing up, I will be walking along and I will get a real sharp pain.

Q. How does that bother you when you perform your normal work as a yardman?

A. Most of the work is going up and down boxcars and walking all the time.

(Testimony of William Kent Carson)

Q. Now you were in the hospital for three weeks in San Francisco? A. Yes, sir.

Q. After you were up there, where did you go?

A. I come back to Tucson.

Q. Did you then attempt to go back to work?

A. Yes, sir.

Q. Just what happened when you went back to work?

A. My back started hurting worse and I had to lay off [22] a couple of days and I would go back to work and try it over again.

Q. Have you been doing that ever since May?

A. Ever since I come back from San Francisco.

Q. That would be about the 1st of June?

A. Yes, sir.

Q. About how many days a week do you average of work now? A. Last week I put in a full week.

Q. How is your back condition getting along now, is it improving? A. No, sir; it still hurts.

Q. But you do work nevertheless?

A. Yes, sir.

Q. Are you wearing any kind of a support on your back? A. No, sir.

Q. Was any prescribed by the hospital, by the doctors up in San Francisco? A. No, sir.

Q. Has any been prescribed by the doctor down at Tucson? A. No, sir.

Q. Now getting back to the time of the accident, Mr. Carson, just describe the force that you were using at the time the club broke. [23]

A. I was just using normal force, the same as I had used all morning, or that I used all the time.

(Testimony of William Kent Carson)

Q. Anything unusual that you were doing?

A. No, sir.

Q. Now when you selected this club from the can, state whether or not it was a used club or a new club.

A. It was a used club, it was almost new. I figured it was all right.

Q. But it had been used? A. Yes, sir.

Q. Approximately how much were you earning a month prior to the time the accident happened?

Mr. Collins: Can't we stipulate to that?

Mr. Brobst: Yes, if you have a year's earnings.

Mr. Collins: I think I have it for five or six months. I don't have a year's earnings. I assume that he averaged about the same, though, don't you?

Mr. Brobst: No. He was sick there about two months before the accident happened.

Mr. Collins: In August 1946 his total net earnings were $344.64.

Mr. Brobst: May I look at it? There is some explanation about some of this.

Mr. Collins: That is his take-home pay that I was reading. [24]

Mr. Brobst: You haven't any for the six months prior to that?

Mr. Collins: That is all I have. Do you want this in the record?

Mr. Brobst: I think we are entitled to the gross earnings.

Mr. Collins: I will give you both.

Gross earnings for August, $400.14. Net take-home pay was $344.64.

(Testimony of William Kent Carson)

September, gross earnings $325.34; net take-home pay $283.34.

October, gross earnings $242.05; take-home pay $214.65.

November, gross $321.83; take-home pay $282.23.

December, gross $247.26; net take-home $220.66.

January—I assume this is when he was sick?

Mr. Brobst: Yes.

Mr. Collins—$98.42 gross, and his take-home pay was $93.82.

His earnings for one-half of September—that is preceding August—was $87.10 pay in lieu of vacation.

He was off duty on February 3rd, the day of the injury, and up to that time for three days his gross earnings were $22.21. I don't know what the take-home pay would be on that.

By Mr. Brobst:

Q. Is that approximately correct, Mr. Carson? [25]

A. Yes, sir.

Mr. Brobst: Incidentally, Mr. Collins, so that it might be clear, what is taken out of the man's earnings that reduces it from his gross to his net?

Mr. Collins: You have your Federal income tax.

Mr. Brobst: Hospital Association?

Mr. Collins: Hospital Association of $2.75. That is what it used to be.

The Witness: It is $3.25 now.

Mr. Collins: That is all that I know of.

Mr. Brobst: Then there is social security.

Mr. Allport: They deduct only the Federal income tax and it does not include hospitalization.

(Testimony of William Kent Carson)

Mr. Collins: I am glad you told me. I didn't know that.

Mr. Brobst: You may cross examine.

Cross Examination.

By Mr. Collins:

Q. Was the Southern Pacific Company the first railroad you were ever employed by? A. No.

Q. What other railroads did you work for?

A. I worked for the New York, New Haven & Hartford Railroad, and the Reading Railroad at Fort Benning, New Jersey.

Q. In the capacity as brakeman or yardman?

A. As yardman on the Reading. [26]

Q. That gives you an experience as a railroad man over what period of time? How long have you been with the railroad? A. About four years.

Q. When you were employed by the Reading and the other railroads which you have mentioned, you were furnished with brake clubs, were you not? A. No, sir.

Q. None of them furnished you with a brake club?

A. No, sir.

Q. Where did you get the brake club that you used?

A. We didn't have any brake clubs there.

Q. Is that because they were operating on level track?

A. Yes, sir.

Q. Then when you came to work for the Southern Pacific you were furnished with brake clubs?

A. Yes, sir.

Q. Every yardman is furnished with a brake club?

A. Yes, sir.

(Testimony of William Kent Carson)

Q. Do you know whether or not brakemen on the road trains, the main lines, are furnished with brake clubs?

A. Yes, sir.

Q. In other words, that is the equipment which is furnished every yardman and every brakeman when he gets to work in that capacity? [27]

A. Yes, sir.

Q. Now on the morning when you picked up this club—withdraw that.

These brake clubs then are handed out from time to time as the yardmen ask for them, is that correct?

A. Well, yes, sir.

Q. In other words, when you go to work there is a big tub or barrel or something in which there are a number of brake clubs? A. Yes, sir.

Q. And you select a brake club from the number that may be there, is that correct? A. Yes, sir.

Q. And in the event a brake club is in there which in your opinion has been used a sufficient length of time you have a right to take another one, do you not?

A. Yes, sir.

Q. And any brake club that appears to you to be defective, you can take it or you can reject it?

A. Yes, sir.

Q. And they will give you a new brake club?

A. Yes, sir.

Q. Is that correct? A. Yes, sir.

Q. About what is the life of a brake club, do you know, [28] approximately? How long are they used?

A. I don't know.

(Testimony of William Kent Carson)

Q. You use them then as long as in your opinion the brake club is usable and good for the purpose for which it is supplied to you, is that correct? A. Yes, sir.

Q. These black marks that we see on the outside and the grooves, that is where you put it into the brake wheel and the dirt rubs on the brake club, is that correct?

A. Yes, sir.

Q. That in no way affects the usefulness of the club or its durability? A. No, sir.

Q. So on the morning when you selected this brake club you saw one which appeared to you to be practically new? A. Yes, sir.

Q. And you examined it to see whether or not it was usable, is that correct?

A. I looked at it to see if there was any splits in it.

Q. Did you or did you not examine it to see whether or not the brake club appeared to be safe to use?

A. Yes, sir.

Q. When you examined the club you found no flaws or defects which were visible, did you?

A. No, sir. [29]

Q. It looked like a practically brand-new brake club, in perfect condition, didn't it? A. Yes, sir.

Q. No examination so far as your eyes were concerned revealed to you, nor with the exception of the brake which appears now—speaking about this crack—that there was any defect whatsoever in the manufacture or construction of the club?

A. Not that I could see.

Q. Then you took the club and went to work and used it that morning, or was it in the evening?

A. It was morning.

(Testimony of William Kent Carson)

Q. How long did you see it before the accident happened? In other words, approximately how many hours?

A. We had been working pretty steady.

Q. About how many hours?

A. About two hours.

Q. You would say that you had tied down—when we say "tied down," so that the jury will understand, we mean setting the brakes. A. Yes, sir.

Q. There is only one brake on one end of the car?

A. Yes, sir.

Q. And that is called the B end of the car, is that correct? [30] A. Yes, sir.

Q. And each time that you set the brake this club gave no indication whatsoever to you that it was going to break, did it? A. No, sir.

Q. Now how many would you say you had tied down since you took this club in the morning, probably 15 or 20 cars? A. I tied down more than that.

Q. About how many would you say in the time that you were working that morning—that is February 3rd, was it not? A. February 2nd.

Q. That you tied down before this occurrence took place? A. (Pause.)

Q. Just your estimate, please, Mr. Carson.

A. About 30 or 35 cars.

Q. You would say then, would you not, when you got this club that there were few marks on it, if at all, and these 30 or 35 cars you tied down did most of that marking on this club, isn't that correct?

A. Yes, sir.

Q. And during the time that you were tying down the 30 or 35 cars there was no indication, such as a

(Testimony of William Kent Carson)

springing in the club or a cracking of the club, to indicate that there was anything wrong? [31]

A. No cracking but it felt a little springy.

Q. What? A. It felt a little springy.

Q. There is a spring, of course, in every club as you use it? A. Yes, sir.

Q. In other words, it was just the normal club that you picked up from time to time and used in tying down cars other than the fact that it did break at the time that you fell? A. Yes, sir.

Q. Now I understand that you were riding a gondola.

A. No, a tank car.

Q. I beg your pardon, a tank car. On a tank car the brake of course is at the B end and between the brake staff and the end of the tank car there is a platform for you to stand on, is there not? A. Yes. sir.

Q. That is, as distinguished from the platform that you stand on at the end of a boxcar? A. Yes, sir.

Q. What distance was there between the brake staff and the brake itself, talking now about the top of the brake—what do you call that, the wheel?

A. The wheel.

Q. What do you call that, that wheel on top that you [33] take hold of? A. Just call it a wheel.

Q. I thought you had some pet name for it.

A. No.

Q. How much distance is there between the wheel on the top of the brake staff and the tank where you were standing to set the brake?

A. From the staff brake to the side of the tank?

Q. Yes, to the end of the tank.

A. About two feet.

(Testimony of William Kent Carson)

Q. You were standing between the brake and the tank, is that correct? A. Yes, sir.

Q. The tank is round? A. Yes, sir.

Q. And then it its customary practice, is it not, in this country to set up the brakes with this club so as to be sure that they don't get away and go down to the main line over the derail and cause an accident, is that correct? A. Yes, sir.

Q. And it was your duty to ride this cut to a standstill and set up the brakes, is that correct?

A. Yes, sir.

Q. Then when this cut of cars—was it two or three?

A. It was three cars. [33]

Q. That is, a boxcar and two tankers?

A. Yes, sir.

Q. When the engineer made the cut, or I should say stopped it and let these cars roll, would you say they were rolling some four or five miles an hour?

A. Yes, sir.

Q. This cut of three cars was then going to go to a joint, to some other cars on the same track which were spotted? A. Yes, sir.

Q. During the process of making up a train to go out on the road? A. Yes, sir.

Q. Is that correct? A. Yes, sir.

Q. How far would you say that the cars which were already in the train which you were making up were from the point where the pin puller cut the three cars loose? A. Oh, about seven cars.

Q. When we speak of seven cars we are speaking of 45-foot cars or 40-foot cars? To which do you refer?

(Testimony of William Kent Carson)

The jury doesn't understand what we mean when you and I speak of about seven car lengths.

Mr. Brobst: I think those cars average about 45 feet.

Mr. Collins: They run from 40 to 55 feet. [34]

By Mr. Collins:

Q. You are figuring on 40-foot cars? A. Yes.

Q. Then the cut was made when the car which was going to a joint on making up the train was somewhere around 210 feet or 200 feet? A. Yes, sir.

Q. And moving about five miles per hour?

A. Yes, sir.

Q. You started to set up the brakes, is that right?

A. I started to set up the brakes when I got clear of the track.

Q. When you got clear of what?

A. When it was clear of the main line.

Q. You mean after you cleared the switch point?

A. Yes, sir.

Q. And you were standing there and you used your hands to take up the slack, is that correct?

A. Yes. sir.

Q. Now so that the jury will understand what we mean by taking up the slack, down at the base of your staff there is a chain which fastens to a pin, is that correct? A. Yes, sir.

Q. And when you set up your brakes you take up the slack by winding up the loose chain? [35]

A. Yes, sir.

(Testimony of William Kent Carson)

Q. There is a certain amount of loose chain on every brake which has to be there for a normal brake, is that correct? A. Yes, sir.

Q. After you have taken up the slack, in other words, taken up all chain, and wrapped it around your staff then you use your club to set it up tightly, is that correct?

A. Yes, sir.

Q. That is a normal, everyday operation indulged in every day by you yardmen, is that correct?

A. Yes, sir.

Q. Then when you put your club into the wheel, the spokes in there, you stick this club in between the spokes, is that correct? A. Yes, sir.

Q. And you gave one pull, is that correct, or had you taken several pulls with the brake?

A. No, I took one pull.

Q. You took one pull? A. Yes.

Q. Did you find the slack pretty well set up at the time you started to pull it? A. Yes, sir.

Q. In other words, the brake slack on that car was [36] just about the normal range of slack that you should find in cars which are in good condition, isn't that right, because you only had to give it one pull?

A. Yes, sir.

Q. The ratchet on that brake was in good shape?

A. Yes, sir.

Q. The dog was in good shape? A. Yes, sir.

Q. There wasn't anything the matter with the brake at all? A. No, sir.

Q. It was a perfectly normal operating brake without any defects whatsoever, wasn't it? A. Yes, sir.

(Testimony of William Kent Carson)

Q. You say there were not any defects?

A. No.

Q. The sole complaint you have in connection with this accident is that a brake club which you yourself inspected before going to work, for some unknown reason broke, is that right? A. Yes, sir.

Q. Of course in setting up a brake you don't measure the exertion or the effort that you put into the pull on a brake club, you give it whatever you think is necessary for the purpose of stopping this car within the distance in which [37] you have so that you will make a normal, easy joint or coupling, as we sometimes call it?

A. Yes, sir.

Q. And whatever that, in your opinion, is necessary, whatever effort is necessary to exert, that is the effort that you use, is that right? A. Yes, sir.

Q. Now, then, when the brake club broke, I take it you were standing about this far from the tank car, this distance between myself and this stand (illustrating)?

A. I was standing a little further away.

Q. About like so (illustrating)?

A. Well, the way I was, I was hanging on with this hand and I was toward the end of the car.

Q. That is right, over this side, but I am talking about the distance between you and the tank car, your back, about how far would you say was the space between your back and the tank car?

A. It was a little over two feet.

Q. Isn't the distance between the brake staff and the car about two feet? A. No, sir.

Q. And you were between that? A. No, sir.

(Testimony of William Kent Carson)

Q. So whatever width your body is, you cut down the [38] two feet between the tank car and your back, isn't that correct?

A. Well, the brake club stands over here and I was over here at the end of the tank like that (illustrating).

Q. In any event, when the brake club broke you went back against the tank car, is that right?

A. Yes, sir.

Q. And you didn't strike the corner of the car, you struck the flat surface?

A. No, I struck the round side.

Q. Tank cars are always round, is that correct?

A. Yes, sir.

Q. You didn't strike any corner of the tank car, any sharp edge of it?

A. I struck the grab iron that was on there.

Q. Now, then, after this accident happened you went over to the hospital and had an examination, is that right? A. Yes, sir.

Q. Did anybody, or did you at any time call attention to any mark or black and blue spot on any portion of your body? A. No, sir.

Q. In other words, so far as your knowledge—you are the man who had the injury—is concerned, there wasn't an abrasion nor mark on your body, was there? [39] A. No, sir.

Q. By the way, did you contemplate riding out at the rodeo last Sunday? A. No, sir.

Q. You didn't have that in mind? A. No, sir.

Q. Didn't anyone tell you not to ride out there?

A. No, sir.

(Testimony of William Kent Carson)

Q. You do some riding, don't you?

A. A little bit.

Q. Are you a bronc peeler? A. No, sir.

Q. Bronc buster? A. No, sir.

Q. I take it then at the present time that your complaint is and has been since this accident some pain over the left hip, is that correct? A. Yes, sir.

Q. That is the limit of your injuries?

A. Yes, sir.

Mr. Collins: That is all.

Does your Honor take recesses?

The Court: I take recesses, yes, when the proper time comes.

Mr. Collins: When is the proper time? [40]

The Court: When you are through with this witness.

Mr. Collins: I am through with him.

The Court: Any redirect?

Mr. Brobst: I was just looking at my notes to see.

The Court: We will take a recess and give you a chance to look at your notes.

I will state, ladies and gentlemen of the jury, that at all recesses and adjournments of court, remember this admonition of the Court so that I will not have to repeat it each time.

You are not to allow anyone to speak to you about this case, nor discuss it among yourselves, nor form or express an opinion until the case is finally submitted to you. Remember this admonition of the Court so I will not have to repeat it.

We will take a recess for 10 minutes.

(Short recess.)

The Court: Proceed.

(Testimony of William Kent Carson)

Redirect Examination

By Mr. Brobst:

Q. Mr. Carson, when you were up at the San Francisco Hospital, did they do anything to you up there to attempt to relieve the pain in your back?

Mr. Collins: Objected to on the ground it is calling for a conclusion of the witness. That is up to the experts to testify to. [41]

By Mr. Brobst:

Q. What did they do to you up there?

A. Before I left they pulled my tonsils out in Tucson, then they pulled my teeth out in San Francisco.

Mr. Collins: I can't hear the witness.

By Mr. Brobst:

Q. Before you left the doctor in Tuzson did what?

A. Pulled my tonsils out.

Q. What was the purpose of that, if you know?

Mr. Collins: That is objected to as calling for a conclusion of the witness. It would be hearsay.

The Court: Sustained.

By Mr. Brobst:

Q. That was done by a Southern Pacific doctor?

A. Yes, sir.

Q. Did you request that they be taken out?

Mr. Collins: That is objected to as immaterial. The presumption is that a doctor doesn't perform an operation unless it is agreed to.

The Court: Overruled. The question is whether he did or did not.

The Witness: The doctor says that my —

Mr. Collins: Just a minute.

(Testimony of William Kent Carson)

The Court: He asked you, did you request the doctors to remove your tonsils. [42]

The Witness: No, sir.

By Mr. Probst:

Q. Then when you got up to San Francisco, what did the doctors up there do?

A. They pulled some teeth out.

Q. Did you request them to pull your teeth out?

A. No, sir.

Q. Did they give you any explanation as to why they wanted to pull your teeth out?

Mr. Collins: That is objected to on the ground it would be hearsay.

Mr. Brobst: I don't think so.

The Court: Overruled. A doctor is in a different situation than the ordinary witness on a man's treatment.

By Mr. Brobst:

Q. You may answer now.

A. The doctor says those teeth might be causing the pain in my back.

Q. Well, then, after you had your teeth pulled out and your tonsils removed, state whether or not you still have pain in your back.

A. I still have pain in my back.

Q. Did the removal of your teeth or tonsils improve your condition any? A. No, sir. [43]

Mr. Brobst: That is all. I have no further questions.

Recross Examination

By Mr. Collins:

Q. You had a previous injury to your back in 1946, didn't you? A. Yes, sir.

Mr. Collins: That is all.

(Testimony of William Kent Carson)

Redirect Examination

By Mr. Brobst:

Q. How long were you off work, if at all, as a result of that injury? A. Two days.

Q. Whereabouts was the injury to your back at that time? A. It was in the lower part of my back.

Q. Which side was it on?

A. It was both my left and right.

Q. How did you get that injury?

Mr. Collins: That is objected to as immaterial.

The Court: You went into it. You asked him if he had received a previous injury. Overruled.

The witness: I was backed up against a caboose.

By Mr. Brobst:

Q. You were backed up against a caboose?

A. Yes. [44]

Q. How long did that condition bother you?

A. That just bothered me about two days.

Q. How long did you work after that steadily up until this accident happened?

A. Right after that I got my thumb smashed.

Q. Were you off work as a result of your thumb being smashed? A. Yes, sir.

Q. But aside from that, did you work steadily right then up to the time this accident happened?

A. Yes, sir.

Q. How long was that? For what period of time?

A. I worked up to about December 27th, then I went to the hospital with a cold.

Q. I don't understand you. How many months did you work after you got hurt and were off for two days,

(Testimony of William Kent Carson)

how many months or years was it up until the time of this accident? A. It was a month.

Q. Then during the month of, I believe it was January or December, when your earnings were down, was it because of that?

A. I had been in the hospital and I had the flu.

Mr. Brobst: I think that is all.

Mr. Collins: That is all.

The Court: You are excused. [45]

(Witness excused.)

Mr. Brobst: Call Mr. Byrne.

DANIEL J. BYRNE, JR.

called as a witness by and in behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your full name?

The Witness: Daniel J. Byrne, Jr.

The Clerk: How do you spell your last name?

The Witness: B-y-r-n-e.

Direct Examination

By Mr. Brobst:

Q. Mr. Byrne, where do you live?

A. Tucson, Arizona.

Q. Do you know the plaintiff in this action, Mr. William Carson? A. Yes, sir.

Q. Were you at Tucson working at the time that he was injured? A. Yes, sir.

Q. What were your duties at that time?

A. I was switching.

Q. You were a switchman? A. Yes, sir.

(Testimony of Daniel J. Byrne, Jr.)

Q. Were you working in the same crew with him?

A. Yes, sir. [6]

A. About what time of the day or night did the accident happen?

A. Well, it was, I would say, around 10:30 in the morning.

Q. What time had you gone to work that morning?

A. 7:59.

Q. Did you yourself see Mr. Carson at the time that this club broke?

A. Well, I seen him on the cars up on track 11 and applying the brake. I didn't see the club break, but I seen him lunge back toward the tank.

Q. You saw him lunge towards the tank?

A. Yes, sir.

Q. Did you then go over to him? A. No, sir.

Q. When did you go over by him, or did he come to you?

A. No, the foreman, he went up, I think the foreman went up towards him and was speaking to him, and I stayed down on the lead with the cut of cars.

Q. How many cars were there in this cut that Mr. Carson was trying to set the brakes on?

A. There was three cars.

Q. What was the type of car that he was riding?

A. A tank car.

Q. Did you go over afterwards and look at the tank [47] car?

A. No, I didn't.

Q. Do you know what type of brake there is that is on the tank car? A. Staff brake.

(Testimony of Daniel J. Byrne, Jr.)

Q. That is a hand brake, is it not? A. Yes, sir.

Q. Have you operated these staff brakes on tank cars?

A. Yes, sir.

Q. And had you operated that staff brake on those oil cars prior to the time that Mr. Carson was injured?

A. Yes, sir.

Q. Now the track that these cars are on, was that on a grade or was it level?

A. It was on a grade.

Q. Did the grade go in the direction in which the cars were moving or did it go upgrade into the track?

A. It went upgrade to go into the track.

Q. About how fast were the cars moving at the time that you saw Mr. Carson lunge toward the tank?

A. I wouldn't say. I couldn't say on that.

Q. You were too far away to judge that?

A. Yes.

Q. Now all these brakes are hand brakes?

A. Yes, sir. [48]

Q. Do you use any other kind of equipment? Do you have to use any other kind of equipment to set them?

A. Yes, a club.

Q. Where did you get those clubs?

Mr. Collins: Is there any dispute about that, counsel?

By Mr. Brobst:

Q. Where did you get the clubs?

A. We generally pick them up at a place where they have them for us.

Q. Just speak up.

A. They generally have them in a can or on an engine where we can pick them up.

(Testimony of Daniel J. Byrne, Jr.)

Q. Who puts them in the can there?

A. The supply man generally fills up the can.

Q. And he is the supply man for the Southern Pacific Company? A. Yes, sir.

Q. Is this the type of club that is supplied to you?

A. (Examining club) Yes, sir.

Q. Did Mr. Carson work any more that day after you saw him lunge against the tank car, that you observed? A. I don't think he did.

Q. Now, Mr. Byrne, is it possible to set those brakes by a single use of the hands without the aid of a club?

A. No, sir. [49]

Q. You have to use the club to set that type of brake?

A. Yes, sir.

Mr. Brobst: I have no further questions.

Mr. Collins: That is all.

The Court: It isn't clear to me how you use this club. What does it do? How do you use it?

The Witness: You could either apply pressure by pulling on it or you can shove on this brake.

The Court: Where do you put it?

The Witness: In the spokes of the wheel on top of the brake. There is a staff and a spoke wheel on top and we generally stick the club in there and wind it up. It tightens it up.

Cross Examination

By Mr. Collins:

Q. It is used for leverage? A. That is right.

Q. By sticking it down through the spoke and pulling in on or pushing on it, whichever you want to?

A. That is right.

Mr. Collins: That is all.

(Testimony of Daniel J. Byrne, Jr.)

Redirect Examination

By Mr. Brobst:

Q. Maybe we can describe it a little better. There is a staff like this (illustrating) on the car, like I have this [50] pencil, is that correct? A. Yes, sir.

Q. Then on top of the staff there is a wheel?

A. That is right.

Q. And the wheel has spokes in it? A. Yes, sir.

Q. When you wind on the wheel on top of the shaft that brings up a chain that tightens up the brake shoes on the car? A. That is correct.

Q. And to get leverage you insert the club in the spokes of the wheel and then you can pull around that way and get more leverage, is that correct?

A. That is right.

Q. Or you shove on it, whichever way you do, is that correct? A. That is right.

Q. And that is what is known as the Ajax hand brake.

A. Well, it is known as a staff hand brake.

Mr. Collins: The Ajax power brake.

The Court: Any further questions?

Mr. Collins: No questions.

Mr. Brobst: That is all.

The Court: You are excused.

(Witness excused.)

Mr. Brobst: Mr. Barnett. [51]

VALNEY BARNETT

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Valney Barnett.

The Clerk: How do you spell that?

The Witness: V-a-l-n-e-y; B-a-r-n-e-t-t.

Direct Examination

By Mr. Brobst:

Q. Where do you live, please?

A. Tucson, Arizona.

Q. What is your business or occupation?

A. Switchman for the S. P. Railroad.

Q. How long have you been switching for them?

A. Five and a half years.

Q. Were you out there as part of the crew with Mr. Carson at the time that he was injured?

A. Yes, sir.

Q. What were your duties at that time?

A. I was foreman.

Q. Did you actually see Mr. Carson at the time that the club broke? A. Yes, sir.

Q. Would you just describe what you saw, please?

A. Well, I saw him setting a brake on a certain car [52] and he fell against the end of the car. At the time I didn't know just exactly what had happened until I could get to him.

Q. Did you go over to him? A. I did.

Q. Did you see the club that he was using when you got over there?

A. Well, I saw a club; yes, sir.

(Testimony of Valney Barnett)

Q. Would you recognize this as being the club?

A. (Examining club) Well, it could be.

Q. Now Mr. Carson has identified it as the club, but it is just exactly like those that they use?

A. That is true.

Q. Now what did you do with the club after you had gotten it?

A. Well, I didn't do anything with it myself.

Q. Who did you turn it over to?

A. Mr. Carson.

Q. About how fast was the cut of cars moving that Mr. Carson was on at the time that he lunged against the end of it?

A. Well, they were practically to a stop.

Q. Now what type of brake was on this — you went over to the oil car, did you, or the tank car?

A. That is true.

Q. What type of brake did it have on it? [53]

A. Staff brake.

Q. Is that a hand operated brake?

A. Well, they are commonly called hand brakes.

Q. Can you set them properly by hand?

A. Not in the Tucson yard.

Q. What are you required to use to set them?

A. A club.

Q. Is that part of the braking equipment?

Mr. Collins: Just a minute.

The Witness: It is.

Mr. Collins: That is objected to as calling for a conclusion of the witness, as to whether it is part of the braking equipment. It may be that they use it for the purpose of operating the braking equipment, but this witness couldn't testify as to whether or not they were

(Testimony of Valney Barnett)

part of the braking equipment of the car itself. Obviously it isn't because it is not attached to the car.

The Court: You may reframe the question. I will sustain the objection for the present. I am not denying you the right to show that it was equipment that was used there.

By Mr. Brobst:

Q. Can the brake be used efficiently without the use of a brake club?

A. Well, not in the Tucson yard, they cannot.

Q. In other words, the brake will not operate effi- [54] ciently unless a brake club is used, is that correct?

A. Yes.

Mr. Brobst: I have no further questions.

Mr. Collins: Neither do I.

The Court: You are excused.

(Witness excused.)

The Court: You say you want a little time, counsel. Do you want the Court to recess until 2:00 o'clock? Will that give you enough time?

Mr. Brobst: Yes, your Honor.

The Court: We will recess until 2:00 o'clock. Remember the admonition.

(Whereupon, at 11:50 o'clock a. m., a recess was taken until 2:00 o'clock p. m. of the same date.) [55]

Los Angeles, California; August 27, 1947; 2:00 o'clock p. m.

Mr. Brobst: Your Honor, I have a witness here and I would like to look at the brake club, if he could step out in the witness room and look at it.

Mr. Collins: Do you want to put him on next?

Mr. Brobst: As soon as he looks at it. May we have a moment?

The Court: Certainly.

(Conference between counsel and witness.)

Mr. Brobst: I will put this gentleman on right away.

WILSON D. JACOBS

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Wilson D. Jacobs.

(Conference between counsel.)

Mr. Collins: Your Honor please, we have agreed that the medical witnesses need not be excluded, if you have no objection.

The Court: Very well, if you have agreed to that.

Mr. Collins: If it is agreeable to your Honor.

The Court: Whatever you have agreed upon is agreeable to me. [56]

Direct Examination

By Mr. Brobst:

Q. What is your business or occupation, please?

A. I am a yardman with the Southern Pacific, this time since October 1921, but I have been working as local chairman for the Brotherhood of Railroad Trainman since 1936.

(Testimony of Wilson D. Jacobs)

Q. How many years all told of railroad experience have you had?

A. My first railroad service was in 1900.

Q. And as a yardman?

A. 1903, with the exception of about four years when I was a brakeman and conductor, 1908 to 1912.

Q. In the course of your work as a railroad man, have you handled brake clubs?

A. Yes, sir, for a great many years.

Q. Have you used brake clubs?

A. Oh, yes. I have rolled cars in the Los Angeles yard for the Southern Pacific for approximately 10 years out of my service here.

Q. During all of that time have you had occasion to use brake clubs?

A. Most of the time; yes, sir.

Q. Now I will show you this brake club —

Mr. Collins: May I ask a question, counsel?

Mr. Brobst: Yes, sir. [57]

Mr. Collins: Your last service as a yardman was when?

The Witness: My last service working in the yard was November 1939, as I remember it.

Mr. Collins: Almost eight years ago?

The Witness: Yes, but I have been representing the yardmen on the Los Angeles Division since 1936, and I go into the yard daily.

By Mr. Brobst:

Q. Now, Mr. Jacobs, do you recognize this as being a type of brake club that is used by the Southern Pacific?

A. Yes, sir.

Q. Would you just state, is that brake club that you have there a normal brake club?

(Testimony of Wilson D. Jacobs)

Mr. Collins: That is objected to on the ground there is no foundation laid as to what is a normal brake club, whether he knows what the specifications are for a normal brake club.

The Court: Sustained.

By Mr. Brobst:

Q. Is that the type of brake club that was in use while you were working for the Southern Pacific Company?

A. Yes, sir. This type of club has been used on the Los Angeles Division of the Southern Pacific for a good many years. I couldn't say exactly how long, but approximately 15 or 18 years. Before that they had a little different type that this. [58]

Q. And you are thoroughly familiar with that type of club?

A. Yes, sir. I have rode many a cab with this type of a club.

Q. And the clubs that you used were supplied to you by the Southern Pacific Company?

A. That is right.

Q. I will ask you now, in your opinion is that a good strong club sufficient to be used in breaking cars?

A. No, sir.

Q. Why not?

A. Well, the club is of an inferior grade of hickory. These clubs are made of, or are supposed to be made of —

Mr. Collins: Just a moment. We move that the answer be stricken out so that I may cross examine on voir dire.

Mr. Brobst: I will ask him why he says that.

Q. Why do you state that?

(Testimony of Wilson D. Jacobs)

Mr. Collins: Just a minute. I still think I am entitled to go into his qualifications.

The Court: Yes, I think so.

Mr. Collins: May the answer be stricken for the purpost of examining on voir dire?

The Court: Yes, it may be stricken for the present. Go ahead. [59]

Voir Dire Examination

By Mr. Collins:

Q. What experience have you had in the manufacture of brake clubs? A. I never had any.

Q. What experience have you had in the tensile strength of wood?

A. I have represented —

Q. No, I didn't ask you who you represented, I asked you a simple question.

The Court: Let him complete his answer.

The Witness: I have represented a great many yardmen that have been involved in accidents on account of cars not being controlled that were under their charge and the specifications of brake clubs have been explained a great many times by the officers of the Southern Pacific Company that purchase them and supply them to the yardmen. That is what gives me the information that I have, on account of the information that I have heard the officers state at investigations.

Q. When you say "officers" you mean trainmasters and roadmasters?

A. And men in the car department and also in the store department.

(Testimony of Wilson D. Jacobs)

Q. So far as you are concerned personally, you have conducted no tests, is that right? [60]

A. Only in applying brakes.

Q. I am speaking now about testing woods.

A. I have assisted in testing brakes where there was an argument as to it.

Q. Would you please answer my question?

The Court: Let him complete his answer. You cut him off too quickly. Go ahead.

The Witness: Let me have the question.

(The question referred to was read by the reporter as follows:

("Q. So far as you are concerned personally, you have conducted no tests, is that right?

("A. Only in applying brakes.

("Q. I am speaking now about testing woods.")

The Witness: Well, I have assisted in making tests on brakes with brake clubs where brake clubs were used and where there had been an accident in connection with investigation that was being conducted.

Mr. Collins: I move that the answer be stricken as not responsive. I asked him what experience he had had in testing the tensile quality of woods.

Mr. Brobst: I will oppose the objection, your Honor.

The Court: He confines his questions to woods. That is what he is objecting to. This witness hasn't testified as to what kind of woods he has had experience with. [61]

Mr. Brobst: This witness refers to his testing of brake clubs when they have broken and accidents have arisen. I think that is proper.

The Court: Overruled. Go ahead.

(Testimony of Wilson D. Jacobs)

By Mr. Collins:

Q. Do you know what the tensile strength of oak is?

A. No, I don't.

Q. Do you know whether or not in the selection of wood for a brake club what examination or what is to be taken into consideration with reference as to how fast it grew or how slow it grew?

A. All I know is what I have heard the officers say.

Q. I am speaking now, Mr. Witness, from your own experience.

A. I never raised any timber.

Q. You don't know anything about how many rings are required or whether any are required or what the growth is?

A. Yes. The growth is supposed to be second growth hickory.

Q. I am speaking about whether it should be fast or slow.

A. I don't know whether they grow it fast or slow.

Q. Do you know second growth hickory when you see it?

A. I am told these brake clubs are supposed to be second growth hickory. [62]

Q. I asked you, can you pick up a piece of wood and tell whether it is first or second growth?

A. I am not a wood specialist, only brake clubs.

Mr. Collins: I object on the ground it is calling for a conclusion of the witness, no proper foundation laid whether there is proper wood in that club or not.

The Court: Overruled.

(Testimony of Wilson D. Jacobs)

Direct Examination (Continued)

By Mr. Brobst:

Q. Now, by picking that club up, can you tell whether or not it is strong enough to use in the ordinary braking operations?

Mr. Collins: That is objected to on the ground it is incompetent, irrelevant and immaterial, calling for a conclusion of the witness.

The Court: Overruled.

The Witness: Well, this club is too light to be of a good grade of wood that will sustain the strain that is put on a brake club when it is applied with any degree of force.

By Mr. Brobst:

Q. Is that something that any experienced supply man can determine by picking it up and inspecting it?

Mr. Collins: That is objected to as calling for a conclusion of the witness.

The Court: Sustained. [63]

By Mr. Brobst:

Q. The only time you ever saw that club was when you walked into the courtroom here just a minute or so before court started?

A. That is right; yes, sir.

Mr. Brobst: I have no further questions.

Cross Examination.

By Mr. Collins:

Q. What is the weight of that club?

A. Well, I couldn't say. I could only estimate. It would be only two and a half pounds, something like that.

(Testimony of Wilson D. Jacobs)

Q. What is the weight of a club that you have in mind?

A. Well, it would be approximately half a pound or so heavier than that.

Q. What is the specified weight, do you know?

A. No, I don't.

Q. You don't know whether it is 18 pounds, 19 pounds or 36 pounds?

A. No, I don't. I don't think there is any specified weight, according to the specifications. If they have any, I have never seen it.

Q. In other words, you are just picking up a club and feeling it in your hand and saying it doesn't feel heavy enough to me?

A. I say because I have seen brakes like that being [64] broken before and breaking them myself before.

Q. You just simply picked it up and after holding it in your hand you say you don't think it is quite heavy enough?

A. That is right. I don't think it is heavy enough.

Q. And you say that you also base your opinion on the fact that you have seen other clubs that are broken?

A. Many of them; yes, sir.

Q. And you have seen all sizes broken?

A. I have.

Q. Lightweight, heavyweight, middleweight? Isn't that true? A. Yes.

Mr. Brobst: Let the witness answer. You cut him off all the time.

The Witness: I would like to have the question re-read.

(Testimony of Wilson D. Jacobs)

(The record referred to was read by the reporter as follows:

("Q. And you have seen all sizes broken?

("A. I have.

("Q. Lightweight, heavyweight, middleweight? Isn't that true?")

The Witness: I have seen all kinds of clubs broken, and some of them are broken on account of being worn, some of them are broken on account of being inferior quality wood that were not worn, and those that were worn that break, if they are a good club and have been used any length of time the brake will be stringy. The break runs through, it will be splintered out, while this is broken in two.

By Mr. Collins:

Q. You don't see any defects in the club, do you?

A. Only the weight.

Q. I asked you about the visible defects.

A. There is no visible defects, but if I would pick that club up, if I was going to ride a car, I would use it with a great deal of care.

Q. Just one more question: You said that the weight in the club indicated to you that quality of the wood, didn't you?

A. It indicates to me the strength of the wood.

Q. Just wherein does the weight indicate quality?

A. Well, I am not a wood specialist and I can't answer it except only in this way, that I know from my

(Testimony of Wilson D. Jacobs)

experience if I get a good heavy club I never have any trouble with it breaking, but a light club that is the same size in dimensions as the heavy club is and it breaks, why that is the only thing that I can say.

Q. You say you represent the yardmen?

A. Yes, sir.

Q. Such as this man? He is a yardman, is that correct? I mean the plaintiff? [66]

A. I don't know him. I never saw him.

Q. He is a yardman, isn't he?

The Court: He said he didn't know.

By Mr. Collins:

Q. Do you know whether he is a yard man?

A. No, I don't.

Q. Well, assuming that he is then you represent yardmen similarly employed, do you not?

A. I represent yardmen on the Los Angeles Division of the S. P.

Mr. Collins: No further questions.

Mr. Brobst: That is all.

The Court: You are excused.

(Witness excused.)

Mr. Brobst: I see Dr. McReynolds is here. Do you have any objection to my putting him on out of order?

Mr. Collins: I thought he was the last witness you had.

Mr. Brobst: No, I have one more.

Mr. Collins: No objection.

CHESTER CORNELL McREYNOLDS

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name, Doctor?

The Witness: Chester Cornell McIeynolds.

The Clerk: How do you spell McReynolds? [67]

The Witness: M-c-R-e-y-n-o-l-d-s.

Direct Examination.

By Mr. Brobst:

Q. Doctor, did you have occasion to examine the plaintiff in this case, Mr. Carson? A. Yes, I did.

Q. When did you make that examination, please?

A. The 22nd of August, this year.

Q. Where was the examination made?

A. In my office in Los Angeles.

Q. Doctor, before we get to the examination, what medical school did you graduate from?

A. I graduated from the College of Medical Evangelists here in this city.

Q. What was the date of your graduation?

A. 1936.

Q. Have you specialized in any particular branch of medicine? A. Orthopedic surgery.

Q. Are you a member of any of the staffs of any of the local hospitals? A. Yes.

Q. Which ones, please?

A. Methodist Hospital, White Memorial Hospital, Los Angeles County Hospital, Mission Hospital and on the courtesy [68] staff at the St. Francis Hospital.

(Testimony of Chester Cornell McReynolds)

Q. Doctor, when Mr. Carson came to you first what did you do by way of examining him?

A. I asked him how he got hurt—he was last examined in our office four months before—then I examined his back in the usual manner that I examine backs.

Q. When you examined his back, what did you find, please?

A. Well, the patient was able to stand erect in normal position and did not have any list to either side as compared with the previous examination, at which time he did have.

He did not have muscle spasm in the lower part of his back, which he had had at the previous examination.

He still complained of tenderness in the lower part of his back on percussion with my fist when he was flexed forward, tenderness in the midline of his back, the lumbus axial junction, and pain on hyper-extending his back.

Q. There was pain there that could be elicited when given these tests, is that correct?

A. That is correct.

Q. To the lower back? A. Yes.

Q. Now what other examinations did you make that would be helpful that you could tell us about?

A. He had pretty forward flection of his back as far [69] as his flection range was concerned, which was improved as compared with his previous examination. He could now reach to five inches of the floor, whereas formerly I think it was 18 inches.

He still had limitation of lateral flection towards the left side. That was present consistently on repeated attempts without calling his attention to it.

(Testimony of Chester Cornell McReynolds)

The special straight leg raising tests were essentially negative. He had no limitation of straight leg raising.

His reflexes and sensory examination was essentially normal. No change.

The size of his left calf was still one centimeter smaller than the right, similar to the last examination. Size of his thighs were equal.

The hip flection tests with the thigh thrown across the patient's abdomen, the so-called reverse Faber test, were identical, a little bit on the left side.

The torsion of the lower back, that is, twisting his back with his right hip forward and shoulder backward, elicited some pain, but torsion of the opposite direction did not elicit any at all.

There was no muscle spasm when it was reversed, but there was some guarding of muscle spasm when put forward.

Q. Doctor, did you take any X-ray pictures to determine what the difficulty was? [70]

A. Yes, we took X-rays of this region of his spine as a comparison of those that we had taken previously.

Q. And would a showing of those X-rays to the jury be helpful to explain the condition?

A. Well, the X-rays are not especially remarkable, the lesions present is not very easily seen at a distance.

Mr. Brobst: I wonder, your Honor, if we have a light box for the display of X-rays.

The Court: The bailiff will see.

The Witness: The X-rays made last April showed nothing of note except a thinning of the lumbosacral disk, that is, the portion between the lower lumbar and the top of the patient's sacrum.

(Testimony of Chester Cornell McReynolds)

By Mr. Brobst:

Q. What would that indicate?

A. That this disk had undergone degeneration changes of long standing, probably present for several months or years.

On reexamination in April there is no essential difference between the two films. There has been no advancement of the lesion or further thinning of the disk.

Q. Doctor, what do you diagnose the plaintiff's condition to be, his present condition? What is causing his trouble?

A. Well, a descriptive diagnosis would be chronic [71] strain of the lumbosacral joint or lumbosacral ligaments, with protrusion of his lumbosacral disk toward the left side. There is some evidence of nerve root irritation, with reference to pain to his left buttock and substantive complaint of numbness, tingling, remittent or recurrent in his left leg below the knee, the outer side of the leg.

Q. What kind of a prognosis can you give?

A. In view of the long-time-continued symptoms since the patient's injury, the patient probably will have the disability in his back if he continues to attempt to do work which requires forward flection and lifting, reaching, probably have pain and disability in his back certainly for three or four months more or perhaps permanently. It is not possible to know. He has a defective joint in that region and persistent irritation of the joint in forward flection position, working in that position, frequently becomes a chronic painful condition.

Q. Is there any treatment suggested?

A. The patient has had all of the conservative type of treatment, that is, physiotherapy and restricted activity,

(Testimony of Chester Cornell McReynolds)

rest, up until one month ago when he attempted to go back to work. We think that after a patient has not responded to that type of treatment he ought to have some type of external support, such as a well-fitting, low back brace to hold his back and to continue his work with the brace on. [72]

Q. Well, now, in the event, Doctor, that the external brace does not relieve his difficulty, what next procedure would be followed?

A. If he is still disabled from doing the type of work that he is in and cannot or does not change his occupation, we recommend that he have an operative fusion of this particular defective joint in order to get away from the symptoms.

Q. Well, now, as far as the defective joint is concerned, you say that is something of long standing?

A. That is right.

Q. And what would happen to a joint like that if force were applied to it?

A. It is sprained, just the same as any other joint that is forced beyond its painless range of motion.

Q. Let me ask you this: Is it possible to go along with a back in that condition and not know of it and then meet with a sudden force and cause it to begin to pain and create trouble?

A. That is most often the history that patients give us for this kind of trouble; yes.

Q. What is your opinion in that regard with relation to this particular man's injury?

A. Well, he has a joint that is more susceptible to injury than a normal joint would be, and once it is injured, the type of tissue that is present, is not capable

(Testimony of Chester Cornell McReynolds)

of recover- [73] ing normal, flexible function as fast as normal tissue is. For that reason his injury is not recovered as fast as you would expect in a normal back.

Q. And as far as the prognosis is concerned, you can't give a definite one until the external support test has been applied, is that correct?

A. In terms of time of disability, no, you cannot.

Q. Something that only time will tell as far as giving a definite prognosis is concerned?

A. That is right.

Mr. Brobst: I think that is all. You may cross examine.

Cross Examination

By Mr. Collins:

Q. You say "this joint"; which vertebra is that?

A. The joint between the lower lumbar vertebra and the top of the sacrum.

Q. The fifth lumbar and the sacrum?

A. That is right.

Q. You say that is of long standing?

A. Yes, sir.

Q. You think there might have been some irritation or some aggravation by reason of this accident that he had?

A. That is what we assume from the history the patient gave us.

Q. You depend to a large extent upon the history that [74] the patient gives you?

A. We have no other source of information.

(Testimony of Chester Cornell McReynolds)

Q. That is true. I wonder if I could see those X-rays. I would like to see between the fifth lumbar and the sacrum, if I may.

When were the first X-rays taken?

A. The first X-rays were taken April 8th of this year.

Q. This is the fifth, right there (indicating)?

A. No, the fifth is right above that.

Q. Right here (indicating)?

A. This part (indicating).

Q. And the sacrum?

A. This is the sacrum.

Q. You say there appears to be a narrowing there?

A. As compared with these spaces above; yes.

Q. Isn't that normally true, that the space between the fifth and the sacrum is smaller?

A. It is often true in patients who are older than this man is.

Q. Isn't it true in normal people, even at ages 18, 24 and 25, that there is a variation and a smaller space between the fifth and the sacrum?

A. There is in the sense that the back part of the joint is usually narrower.

Q. That is right. [75]

A. The front part is usually wider. This other film demonstrates it a little better.

Q. There has been no damage or injury to any of the intervertebral disks?

A. The bone shadows are normal.

Q. Perfectly normal? A. That is right.

(Testimony of Chester Cornell McReynolds)

Q. You base your opinion wholly upon an opinion that there is some narrowing there?

A. It is less than half the width we would expect.

Q. It is not very marked, is it, Doctor?

A. Yes, it is quite marked.

Q. Let's see the other picture. (Indicating). It doesn't seem to be so marked in this picture.

A. No, the center of the X-ray tube was different so it passed between at this level and shows more accurately the condition present.

Q. In other words, had the center of the tube been properly placed it would not show as much narrowing in the picture that was taken in April as it does in this, is that correct?

A. I don't believe there is any essential difference as far as the meaning of the X-rays are concerned. No, it is the same in both films.

I would like to point out, however, that the narrowing [76] that is of significance as far as we are concerned is shown by a parallel pattern between the two bone surfaces. Now normally at this level, usually at this level, the front of the joint is wider apart. A degenerate change has permitted these two vertebrae to come together so that the two joint surfaces are parallel, and that is the thing that is of significance as far as we are concerned.

Q. Of course, Doctor, this degenerate change has been taking place for a long period of time?

A. Yes, that is correct.

(Testimony of Chester Cornell McReynolds)

Q. When you have damage to the intervertebral disk or where degenerated changes are taking place, every time the man walks or steps it affects that joint, does it not?

A. It affects all the joints in the spine.

Q. And particularly the one which has been damaged?

A. Yes.

Q. And that has been damaged some time either by trauma or from some other cause?

A. Very probably a gradual process; usually.

Q. In other words, we have a man here in which there is a gradual degeneration of the intervertebral disk between the fifth lumbar and the sacrum?

A. That is correct.

Q. Is that right? A. Yes. [77]

Q. And the pictures taken in April show a condition which is worse than the pictures taken here just about a month ago?

A. No, they show essentially the same condition.

Q. In other words, there has been no change from his condition, from the degenerate changes that have been continuing over a period of years, in April than there was a month or so ago when you took more pictures?

A. That is correct.

Q. In other words, it is stationary, is that right?

A. As far as the X-rays are concerned; yes.

Q. And doctors are compelled to fall back upon both substantive and objective symptoms?

A. They always are.

Q. That is correct, is it not? A. That is right.

Q. I think on your last examination the only objective symptom that you said that you found was some muscle spasm? A. And limitation of motion.

(Testimony of Chester Cornell McReynolds)

Q. Limitation of motion means how far the patient can bend or move either laterally or posteriorly?

A. As compared with the opposite direction; yes.

Q. But so far as the muscles were concerned, you found some muscle spasm?

A. Yes, with certain motions there was. [78]

Q. Explain to the jury what you mean by muscle spasm.

A. When muscles are relaxed, that is, when a patient is not using a muscle in order to maintain, in this case, his back in some particular position, the muscle is soft to touch. You put your hands on it and you can feel it, and as soon as he moves you can feel that tightness under the fingers.

Q. It is the same as flexing my arm, you can feel the muscle get tight, isn't that true? A. Yes.

Q. In other words, it may or may not be voluntary spasm of the muscle or it may be involuntary?

A. Well, it is possible to know whether it is voluntary or involuntary.

Q. I know it is possible.

Now at the commencement of the cervical spine you found that in very good shape?

A. I didn't examine his cervical spine.

Q. Did you make any examination of the dorsal spine?

A. Yes.

Q. What did you find there?

A. It was apparently normal in all of its functions.

(Testimony of Chester Cornell McReynolds)

Q. Did you find any indication of degeneration of any of the intervertebral disks, of the segments of the dorsal spine?

A. No objective evidence of it; no complaint about it. [79]

Q. Then you did find some complaint about pain in the lumbar spine?

A. In the lower end of it; yes.

Q. And you attributed that, I think, to a sacro-iliac sprain, isn't that what you referred to it as?

A. Yes.

Q. And didn't you say a bit ago that he could lean forward within five inches of the floor?

A. That is right.

Q. Normally?

A. I said he could lean forward to within five inches of the floor at the time I examined him.

Q. And that is approximately normal range of motion, is it not?

A. It is very good, yes.

Q. Better than you can do?

A. Well, I can do a little better than that.

Q. Now the next test that you gave him was the straight leg raising test, is that correct?

A. That is right.

Q. And you said both on the right and left side they were normal, didn't you?

A. They were equal on the two sides.

Q. Were they normal too? In other words, he could —

Mr. Brobst: Let the doctor answer. [80]

(Testimony of Chester Cornell McReynolds)

By Mr. Collins:

Q. Were they normal?

A. The motion of range on the affected side equaled the motion of range on the other side. That is normal for the patient.

Q. Let's put it this way: In the extension of the leg, that means bringing it up in front, does it not?

A. Flection of the leg.

Q. You found it within normal limits, did you not?

A. Yes.

Q. Isn't it true that when flection is within normal limits, and also his ability to bend forward, that it rules out a sacro-iliac sprain or a sacro-iliac subluxation?

A. I am not talking about a sacro-iliac subluxation.

Q. I am talking about it. Doesn't rule out damage to the sacro-iliac?

A. No, counselor. We are talking about the lumbar sacral joint, which is a different joint entirely.

Q. Doesn't it also rule that out?

A. Not entirely.

Q. You didn't find any muscle spasm, did you?

A. Yes.

Q. Where?

A. In the lumbar sacral region on the left side.

Q. To what extent? [81]

A. Sufficient to limit motion and torsion of his back.

Q. In other words, when he moved his back he complained to you, isn't that true?

A. No, I could move his back passively in the opposite direction without pain to him. I moved it forward, with a forward rotation of his hip to the right side and involuntarily he could not allow me to move it.

(Testimony of Chester Cornell McReynolds)

Q. In other words, there was resistance there?

A. Yes, that is right.

Q. Now did you find whether or not there was any muscle atrophy?

A. There is no gross muscle atrophy.

Q. In other words, when muscles atrophy it means there is lack of use, isn't that true?

A. That is right.

Q. And when there is no muscle atrophy it indicates the man is using his muscles daily?

A. Very possibly.

Q. You know, Doctor, if he didn't use his muscles they get soft and flabby, don't they?

A. That is right.

Q. And when you examined the back, did you find any atrophy of the muscles of the back?

A. No, sir, no atrophy.

Q. In other words, you found a man whose back muscles [82] showed no atrophy at all?

A. That is correct. The only atrophy he had was in his left calf.

Q. Now, Doctor, you said it was one centimeter, didn't you? A. Yes.

Q. Isn't it true that you can take any juror in this jury box who is right-handed and measure his leg and you will find a difference of from one to three centimeters and yet they are perfectly normal?

A. No, sir, the normal variation is much less than that.

Q. How much is a centimeter?

A. There are two and a half centimeters to the inch.

(Testimony of Chester Cornell McReynolds)

Q. So you have about a quarter of an inch here?

A. A little more; about three-eighths of an inch.

Q. Isn't it true that nearly everyone has that variation, that this variation on this man is perfectly within normal limits?

A. No, I think not.

Q. How many people have you examined and found a variation of that amount or more in which there had never been any injury at all?

A. A very few of them that had that much difference in the calf of the leg that do not either have a history of some injury to the leg or a long-time history of pain in the leg. [83]

Q. Is that true in the arms also?

A. It is less true of the arms than it is of the legs.

Q. You say all the reflexes were normal?

A. That is right.

Q. The Babinski was normal?

A. That is right.

Q. The Achilles was normal? A. Yes.

Q. The Romberg was normal? A. Yes.

Q. Everything was normal about this time except that he complains of pain and the muscle condition which you said appeared upon movement?

A. And limitation of movement.

Q. That is correct. Everything else is normal?

A. Yes.

Q. Of course you can't see pain, can you? In other words, Doctor, outside of a small amount of muscle spasm you found nothing wrong with this man objectively at all, did you?

A. Well, counselor, we have gone over that point several times. I have always said there was limitation

(Testimony of Chester Cornell McReynolds)

of motion, which is not associated especially with muscle spasm.

Q. When we are talking about limitation of motion, you take my arm and move it?

A. That is right. [84]

Q. If it moves freely there is no limitation of motion. That is correct, isn't it?

A. If you move it as far as the other arm and the other arm is normal we will say that it is free.

Q. When you take hold of it to move it laterally or up and down and I resist you, then there is limitation of motion, isn't there?

A. That is voluntary limitation.

Q. There is limitation of motion though?

A. Yes.

Q. Now do you have any idea how many years this man has had this degenerative condition taking place between the fifth lumbar and the sacral joint?

A. That would be nothing but a guess, but certainly it has been longer than the time since his injury, which is only about six or seven months ago.

Q. In fact, it has probably been many years, is that right?

A. I have no other way to say it except that it probably has been, yes, more than two or three years.

Q. With that condition existing between the fifth lumbar and the sacral segment, jumping off and on cars, wielding brake clubs, wouldn't you expect him to have some pain?

A. Not until he has some forced or unguarded motion [85] that forces this defective joint beyond its free range of movement.

(Testimony of Chester Cornell McReynolds)

Let me explain further. The lower end of the back is a series of movable joints, and one joint will move as far as it goes, the other joints will move as far as they go, and when all joints have moved as far as they go then any force beyond that point will put an unusual strain on the weakest point, or on the most irritable link.

Q. Would you say that that force would be a movement forward or backward?

A. It may be in any direction.

Q. Now, Doctor, did he tell you about being hurt before on this railroad, of having his back injured in approximately the same place?

A. No, he gave neither Dr. Taylor nor I such a history of an injury.

Q. On December 2, 1946, in which he was off several days?

Mr. Brobst: Two days.

Mr. Collins: I said several. Doesn't that mean two in your language?

Mr. Brobst: No. A couple means two; several means more.

By Mr. Collins:

Q. You would expect, would you not, that there would be some complaint of pain, wouldn't you? [86]

A. Yes, if he were laid off two days because of pain in his back and he told me, I would have agreed with him.

Q. You would expect that this would have had something to do with his condition?

A. If it happened in the same place, I would say yes.

Q. He said it was approximately the same thing this morning, and you haven't any idea at the present time,

(Testimony of Chester Cornell McReynolds)

with this knowledge before you, whether that would have caused it or whether this would have caused it, have you?

A. If he went back to work the second day after his injury and worked until the present history of injury, I would say it probably contributed a little towards it.

Q. And perhaps this one contributed some more to it.

A. It doubtless did.

Mr. Collins: That is all, Doctor.

Mr. Brobst: That is all. Thank you very much.

The Court: You are excused.

(Witness excused.)

The Witness: Do you wish to keep these X-rays here?

Mr. Collins: I would like to keep them.

Mr. Brobst: Will you put Dr. Sutherland on out of order?

Mr. Collins: Certainly.

The Court: Is this witness called for the plaintiff or the defendant? [87]

Mr. Collins: For the defendant. We are putting him on out of turn.

The Court: Have you agreed?

Mr. Brobst: That is all right with me. I have consented.

ROSS SUTHERLAND

called as a witness by and in behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name, Doctor?

The Witness: Ross Sutherland.

The Clerk: How do you spell your last name?

The Witness: S-u-t-h-e-r-l-a-n-d.

Direct Examination

By Mr. Collins:

Q. Are you a doctor of medicine? A. Yes.

Q. And your educational qualifications are what?

A. Southern California in 1920, practicing industrial orthepedic surgery since 1924.

Q. Post graduate, if any?

A. Nine years of special orthopedic training with Ellis Jones.

Q. Dr. Ellis Jones? A. Yes.

Q. Are you on the staff of any of the various hospitals [88] here?

Mr. Brobst: I will stipulate to the doctor's qualifications if it will save time.

The Witness: Queen of Angels, California, Long Beach Community, Riverside and Palm Springs and Las Vegas.

By Mr. Collins:

Q. Did you examine Mr. Carson, Doctor?

A. Yes, on August 13th.

Q. Would X-rays taken in April 1946 and some later on be of any help to you?

A. Yes, they would, particularly in the lumbar sacral joint.

(Testimony of Ross Sutherland)

Q. There are some pictures that were taken. I think one set was taken in April and you can see when the other set was taken. It may be of some benefit to you.

A. (Examining X-rays) This patient is 25 years of age. He has a congenital failure of fusion of the lamina of the first sacral segment.

Q. Explain to the jury what you mean by that.

A. Well, where the process extends out in the vertebra they fail to fuse in the midline, and that is a minor defect giving a minor mechanically deficient back.

Q. You mean by that he was born that way?

A. Born that way, yes.

Actually there are changes in the angle of the lum- [89] bar sacral joint when you have these congenital anomalies.

In this particular case I heard Dr. McReynolds testify that he thought the joint was narrowed. I don't quite agree with that because I feel that where there is a preexistent congenital anomoly I think this is somewhat of a normal joint for this type of mechanically inefficient low back.

He mentioned the fact that it wasn't quite wide enough forward. I think that is somewhat the angle of the tube, because I have a picture that shows very much widening of the front of the joint, and also the typical narrowing of the posterior part of the joint that he referred to. I don't see any particular erosion in it.

Q. What do you mean by "erosion"?

A. That is roughness of the superior border of the sacrum showing any traumatic change. In comparison with this picture I think it is definitely —

(Testimony of Ross Sutherland)

Q. Will you put the two of them side by side and demonstrate to the jury the congenital anomaly and why that is a normal back outside of the congenital anomaly in the lower lumbar sacral region?

A. The present existing congenital anomaly makes this joint a little variable, and I don't think there is any particular abnormality of the joint outside of the congenital anomaly. I think the man had a lumbosacral strain. When I examined him he seemed to have more of a sacro-iliac condition [90] than a lumbar sacrum. I felt that he was well on his way to recovery.

All these congenital anomalies, the low back, particularly in the lumbosacral joint, even when they are minor they are all predisposed to minor back weaknesses and they don't stand the strain of normal occupations as well as a normal back. So I didn't think he had any serious disability.

Q. Will you resume your seat, Doctor?

Now will you give the jury the result of your complete examination that you made of this man from the top to the bottom?

A. I examined him and we didn't find anything in the head or face or nose. There were no cranial nerve disturbances, no cranial nerve injuries. He had no trauma to the head structures except I thought he sustained a mild strain on the capillary muscles on the right, and also a little strain of the right shoulder joint. He had a little strain of the muscles there, from which he had recovered.

Then he had this back strain, which was probably a lumbo-sacral affair and probably some left sacro-iliac. I don't think he had any serious cord injury or any serious disk injury.

(Testimony of Ross Sutherland)

The congenital anomaly I think predisposes to his injury, makes him more easy to have a back injury, as his past history shows. [91]

The rest of the general examination was negative.

He had a slight first degree round back for a full range of motion.

Q. What do you mean by first degree round back?

A. On standing his back is a little more round than normal. He doesn't maintain his curve. It is a postural condition.

Q. And that comes from —

A. That is from childhood.

Q. The way he used to sit?

A. That is right. And sometimes it is a family background. But it is all a postural condition.

There was no disease in the spine or arthritis. He had a normal lumbar curve and there was no lumbar spasm.

I thought he was a little tender over the superior angle of the left sacro-iliac joint. There was no sciatica. I found no clinical findings of the disk.

He was a little tender along the ligaments from the superior angle of the left sacro-iliac joint over to the lumbo-sacral.

The right straight leg raising was free. The left straight leg raising was very slightly limited, about 60 degrees.

Q. You mean you were able to flex the leg to 60 degrees? [92] A. That is right.

There was no apparent or real shortening of the lower extremities, and no acute lumbosacral symptoms at the time I examined him on the 13th.

(Testimony of Ross Sutherland)

Q. Did you find any spasm?

A. I demonstrated no spasm except what Dr. McReynolds testified to, on extreme movements to the left he was conscious of it but I didn't feel any particular spasm.

On sitting his spine was straight and there was no spasm, and he got on and off the examining table without any discomfort whatsoever. He walked without a limp.

Q. Do you see any reason why this man shouldn't follow his occupation if he wants to?

A. No, I think the man can follow his occupation, and he is going to have further back strains as he gets older because all these congenital low backs, even with minor anomalies, they are more predisposed to strain and weakness as they get older.

Q. You mean that condition will come on irrespective of this alleged accident that he had, or the accident that he had?

A. Any case with anomalies of the lombosacral joint develop back strains and aches as they get older without any increase.

Q. Do you think then that the accident that he had has [93] anything to do with his back strains or the pains and aches that develop and will develop in the future?

A. No, I think this man will get over it. He apparently got over his injury that he had on 12/6/46. That shows right there he had a minor strain. He was off a few days. He will probably get over this one and later on he might, just by stepping off a car or lifting something, have another back strain. These low back

(Testimony of Ross Sutherland)

congenital anomalies have typical histories and sometimes they get quite disabled, but it is not from any one particular accident.

Q. In other words, irrespective of whether he ever had an accident, his condition in all probability would develop in the future?

A. Yes. He may go for many years or months and then he might have a lot of back trouble.

Q. That could come just from his normal work?

A. Yes. When a man of 25 starts having back symptoms with a minor anomaly, the prognosis is not particularly good for heavy manual work around the age of 40.

Mr. Collins: That is all.

Cross Examination

By Mr. Brobst:

Q. Doctor, would the removal of tonsils improve his condition?

A. Not necessarily. That is speculative because [94] we never take them out unless they have some secondary aggravation from a focal infection. In this particular case his sedimentation is entirely normal. In this particular case his sedimentation is entirely normal. He doesn't show any evidence of focal infection. His Wasserman is normal. His sedimentation is normal. The blood count is 93 per cent, reds 5 million, 90,000, and white 6100, so he isn't carrying around any focal infection.

Q. Would removal of the teeth help any?

A. Sometimes if they get an infected tooth and you get a back strain you take it out.

(Testimony of Ross Sutherland)

Q. That isn't indicated in this case, either removing of tonsils or removing of teeth?

A. I didn't see any indication from his lab work. Of course abcesses are not particularly good in the recovery of back injuries.

Q. Well, now, Doctor, the fact is that the way the man's back is now you wouldn't advise him to go on into heavy labor, would you?

A. I would advise him to wear a girdle and gradually work back into his regular work within a few weeks.

Q. You would suggest that a girdle be worn?

A. Yes. They get weakness from disuse, an active man of 25 just sitting around.

Q. You got a history from him that he was in the San [95] Francisco Hospital for about three weeks, didn't you.

A. Yes. My history was that he had twisted his club and it broke and he was twisted up against a tank car. He was taken to the S. P. Sanitorium and X-rayed. He went home and went to bed, the following day starting treatments, outpatient therapy, sent to S. P. Hospital at San Francisco for two weeks. You see, this man has never been down very long for any particular symptoms.

Q. He has a history of a continuous course of treatment though?

A. Yes, and he has been ambulatory all the time. He also had three teeth extracted.

Q. He had his tonsils taken out too.

A. If you have any focal infection you just don't get better. That lab work of mine was done on 8/2.

Q. The fact that he has is more susceptible to injury than a normal back? A. Yes.

(Testimony of Ross Sutherland)

Q. And once you get an injury it is harder for you to recover than if you have a normal back?

A. Yes, on account of the fact that he has a predisposed weakness to begin with.

Mr. Brobst: I think that is all.

The Court: You are excused. [96]

(Witness excused.)

Mr. Collins: I would like to have the other gentleman back now.

The Court: Do you want to recall the doctor?

Mr. Brobst: I wonder, your Honor, if we could take the afternoon recess and I will see if I can find him.

The Court: We will recess for 10 minutes.

(Short recess.)

VALNEY BARNETT

recalled as a witness by and in behalf of the plaintiff, having been previously duly sworn, resumed the stand and testified further as follows:

Mr. Brobst: You have been sworn before.

The Clerk: Your name is?

The Witness: Valney C. Barnett.

Direct Examination

By Mr. Brobst:

Q. Out there at the Tucson yards, have you seen the supply man make any examinations or tests of those clubs? A. I have not.

Mr. Collins: That is objected to as incompetent, irrelevant and immaterial.

The Court: He said he had not. Overruled.

(Testimony of Valney Barnett)

By Mr. Brobst:

Q. What is the practice out there as far as giving these men the clubs with reference to whether or not any test [97] is made by the supply man or whoever has charge of them for the company?

Mr. Collins: That is objected to on the ground that this man can't possibly be present to know what tests are made before they are given to the men. All he knows is that he picks up a club and goes to work with it. He is not in the supply department.

The Court: What have you to say about that?

By Mr. Brobst:

Q. Mr. Barnett, out there at the Tucson yards have you observed the supply man receiving these clubs and putting them out for the men to use?

A. Well, I have seen him put them out.

Q. What do they do as far as he is concerned?

Mr. Collins: That is objected to as wholly immaterial, if you Honor please.

The Witness: The clubs come in—

The Court: Overruled. Go ahead.

The Witness: The clubs come in a heavy burlap bag, sewed on both ends, and they are set out there in a container for you to pick up and take, and it is up to us to open the bag that they are in.

By Mr. Brobst:

Q. As far as any test being given by the supply man who puts them out, state whether or not any is given. [98]

Mr. Collins: That is objected to as calling for a conclusion of the witness. He can't possibly know what tests have been made on those clubs.

(Testimony of Valney Barnett)

The Court: He asked him if he did any, if he observed any tests.

By Mr. Brobst:

Q. Did you see or observe any tests being made by any of the supply men at any time while you were working out there at the Tucson yards?

A. I have not.

Q. The clubs that are furnished to the men, are they all new clubs or some used clubs?

Mr. Collins: That is objected to as wholly immaterial.

The Court: Overruled.

The Witness: Well, they are new clubs to begin with and a lot of times they are used and put back in the container and used again the next day.

By Mr. Brobst:

Q. So that you have a selection of both used and unused clubs, is that right?

A. That is right.

Mr. Brobst: I have no further questions.

Cross Examination

By Mr. Collins:

Q. Do you know what the normal life of one of these [99] clubs is?

A. It depends on your job.

Q. It depends on how many times they use the club to knock the dog off of a brake staff?

A. That could be true.

Q. You fellows use them for that purpose?

A. Yes, sir.

Q. They are only supposed to be used to tighten up the brake wheel? A. That is right.

(Testimony of Valney Barnett)

Q. But you trainmen come along and take the club and use it for a hammer, do you not?

A. I have seen some of it in the service but very little of it in the yard service.

Q. When you have a club it is for you to determine whether or not the club is a fit club or not?

Mr. Brobst: I will object to that. That calls for his conclusion.

The Court: Sustained.

Mr. Collins: That is all.

Mr. Brobst: That is all. Thank you very much.

(Witness excused.)

Mr. Brobst: That is all, your Honor. The plaintiff will rest.

Mr. Collins: We have just the one witness here to-[100] day and we will put him on, if your Honor please.

ROBERT ADAM GRAHAM

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Robert Adam Graham.

Direct Examination

By Mr. Collins:

Q. What is your business, Mr. Graham?

A. Assistant chief chemist, Southern Pacific Company.

Q. Do you have under your supervision the making of tests of brake clubs that are used on the road?

A. Yes, sir.

(Testimony of Robert Adam Graham)

Q. Now do you know from whom the brake clubs are purchased? A. Yes, sir.

Q. What company?

Mr. Brobst: I will object to that, your Honor, as wholly immaterial.

The Court: Sustained.

Mr. Collins: I wonder, your Honor, in the absence of the jury if I could have your Honor read an authority?

The Court: It isn't necessary for me now. Where you purchase your materials from in the operation of your railroad is not material. [101]

Mr. Collins: I want to know from whom they purchase it. I don't like to discuss this in the presence of the jury.

The Court: The jury may be excused for a few minutes, I will hear what you have to say.

(The jury retired from the courtroom at 3:30 o'clock p. m.)

The Court: Go ahead.

Mr. Collins: The defense in this action, if you Honor please, is that these clubs are purchased through a reputable manufacturer and as such we have a right to rely upon the manufacturer sending us an instrumentality constructed safely for the purpose for which it is to be put.

In this case of Lowden v. Hanson, 134 F. (2d) 348, that identical point was raised, and which involved the purchase of a switch standard.

It is the position of the railroad company in this case, and I must have indicated that on cross examination

of the plaintiff, so far as he was able to observe this club showed no flaws. Now by this witness we expect to show that we bought from a reputable firm. We expect to prove by witnesses here in town that they are a reputable firm, a reputable manufacturer. When that has been established, as I will read from this authority, that is about the extent to which we have to go in the defense of this case.

The Court: Who was the judge that wrote that opinion? [102]

Mr. Collins: This is an action that was brought on a switch standard which broke when the switchman attempted to throw it. In this case of course we have a switchman's club. The Court said:

> "As employers they (the railroad) were under the duty of exercising ordinary care in furnishing the plaintiff with reasonably safe appliances with which to work and a reasonably safe place in which to perform his services. But this was not the limit of their duty toward the plaintiff. They were under the continuing duty or exercising ordinary care to see that the instrumentalities and appliances furnished for the use of plaintiff, as well as the premises where he was required to work, were maintained in a reasonably safe condition * * * It was, therefore, their duty to have the appliances so furnished inspected from time to time. Here it appears from the undisputed evidence that this spring switch stand was one of standard make, in general use and manufactured by a reputable manufacturer. When received and installed it was in the nature of a unit and not dismantled; that there was no evidence that it was not properly installed so that in

the first instance it cannot be said that the defendants failed to exercise ordinary care in supplying, fur- [103] nishing and installing this equipment * * * Of course, the rule could not be invoked if the appliance or equipment were patently and openly defective."

You will remember on my cross examination of the plaintiff he said it was not defective, that there was nothing that he could see. The burden then shifts to us to establish where we got it and whether the manufacturing company is a reputable one.

Then the Court goes on:

"But there was nothing about this finished product indicating to the naked eye that it was at the time it was installed deficient in any particular, and no one is required to guard against that which a reasonably prudent person under the circumstances could not anticipate as likely to happen; the equipment having been purchased from a reputable manufacturer, we are clear that the defendants could not be charged with negligence because of any structural or inherent defect which was not patent at the time of its installation. Defendants were warranted in assuming in the absence of any notice to the contrary, that the equipment was without structural defects, and it was not incumbent upon them to dismantle the appliance and separate it [104] into its various parts for the purpose of discovering possible defects. It was manufactured, assembled, inspected and tested by experts before it was ever placed upon the market. This was implied from the fact that the manufacturer was a reputable one. While it was the duty of defendants to inspect

this appliance, it is our view that in the absence of any evidence that it was not properly functioning, defendants were not required to dismantle the appliance and submit it to a microscopic inspection * * *"

So the only defense I have in this case is that it was bought from a reputable manufacturer.

The Court: Who is the judge that wrote that opinion?

Mr. Collins: Judge Gardner.

The Court: A district judge?

Mr. Collins: The United States Circuit Court of Appeals.

Now, then, counsel knows that my position is correct. He likewise knows that this isn't the only authority on this subject.

Now what would be our next procedure in this case in direct sequence of what we are going to prove in this case in our defense? First that we bought from a reputable manufacturer; proof by our people that they are reputable; proof by others who have been dealing with them. Second, that they delivered it in the regular course of business to us. That [105] presumption then continued under this authority that it had been properly inspected as coming from a reputable manufacturer.

Now the Southern Pacific goes further than that. We follow the principle of taking a certain percentage of the clubs and making a further test. Those tests which we make on any group of clubs completely destroys the club which we make the test upon, completely destroys it for any further use in the operation of a railroad. So when counsel makes an objection to the name of the manufacturer, which is only preliminary to prove whether or not he is a reputable manufacturer, and the

Court sustains that objection you take away from us one of our pleaded defenses.

Mr. Brobst: I have never read this decision, your Honor, and I am not familiar with any other cases. The only cases that I am familiar with hold directly the opposite, particularly in a case of this kind where the club was stated to have been a used club and where they put it back into use for this man to use.

There might be something in the point that if they come in there brand new and they put them out to use, but even then when they are supplying a man with an instrumentality which, if defective when used is a dangerous instrument, if those cars had been moving the man could have been thrown beneath the wheels and killed, so it isn't an ordinary tool, it [106] is a tool that if it isn't proper it is extremely dangerous to use.

As I say in this case who it was purchased from becomes immaterial when it is a used club. This is a case where a switch stand was put up that had to be dismantled if it was to be inspected underneath and, as I understand it, something in the mechanism inside broke. This doesn't have to be dismantled to be inspected.

The evidence by the yardman, who had had some 40 years of experience, is that that was a lightweight club and should not be used, and the only time he ever saw it was when he walked in the room and I put him on the witness stand in less than a minute's time.

In view of the fact that this is not a new club and it is a used club, even this authority would not cover because nothing had to be dismantled. It is a club that can be inspected by looking at it, lifting it and testing it. It certainly seems to me that where it was manufactured disappears out of the case after it becomes a used club and is put back in use.

Mr. Collins: Apparently, your Honor please, counsel has not read this authority. This is a case decided in 1943, subsequent to the amendment of 1939.

In this case a switch standard becomes second-handed the day that it is put in operation. They held in this case that [107] the railroad company was liable because there was a simple method of making a test on this, and that was by tapping it, but that the evidence as to where they bought it, whether it was a reputable firm, becomes a primary factor in determining defense in this character of cases.

Now, then, I can only show care on the part of the railroad company, first by showing the care in which we selected the club, secondly, the tests that we made, the examinations we made. I have already proved from the lips of their own witness that there was no visible defect — both of them. I expect to go further and prove that this club is within the category of clubs which I have described to your Honor from this manufacturer.

The Court: Are you through, gentlemen?

Mr. Brobst: Yes, your Honor. I will submit the matter.

The Court: If a railroad company is relieved from liability or negligence because it has purchased its equipment, or any part of it, from a reputable manufacturer who furnishes it, then you can never recover in an action against a railroad company under any condition. If a man is riding on a railroad car and the wheels under the car break, causing the injury, the railroad company could come in and say, we purchased it from a reputable manufacturer and therefore we are not liable. You could mention instance after instance. If it is a defense for a railroad company to come in and say, we purchased [108] our appliances or our equipment that

prove to be inefficient at the moment of the accident, from a reliable concern, then there never can be a liability on a railroad company. That would foreclose it right there. That is not the law.

This railroad company assumes to use at the time that the accident occurred efficient appliances and equipment to protect the public and its employees. That is fundamental under the law. If it is not the case, then you can never recover from a railroad company in any instance. All they would have to do is show what you are attempting to show here, that they purchased the appliance that brought about the accident, that showed it was defective at the time, and then you cannot recover. That is not the law. That is not justice. That is the responsibility that the railroad company takes as railroads to protect the public in the operation of its road and in dealing with the public. If not, I could name you instance after instance in the appliance of a railroad company, from its equipment from the engine to the last car where they could say, we purchased it and we didn't know the appliance was defective or deficient, therefore we are not liable because we purchased it from this great manufacturing company, which is a reputable company. A railroad company is not relieved under those conditions. They assume the liability to protect the public and protect the employees that they will use efficient appliances in the operation of their road. That, to my [109] mind, has always been fundamental in the law in actions of this character.

Mr. Collins: I appreciate your Honor's view, but —

The Court: If I permit you to go ahead and show that you bought this club from a reputable manufacturer and therefore you didn't know it was weak, didn't know it was not strong enough to do the work that you ex-

pected this man to do, then there could be no recovery if I permitted you to do that, none whatever.

Mr. Collins: May I be heard now?

Your analogy with reference to the car breaking or rails breaking was tried out, and I have the authorities here for your Honor. In this same district just two weeks ago we had such a case which we won. Mr. Hildebrand tried the case and lost it.

Mr. Brobst: That isn't correct. The rule there is different. There there was a question where they used reasonable inspection, and showed that reasonable inspection couldn't discover the defect, which is all right. I have no quarrel with that.

Mr. Collins: I cannot control your Honor's ruling, but if you are going to preclude me from introducing this evidence, then I expect to make an offer of proof.

The Court: I am not denying you the right to proceed in any way you wish, but I have to rule as I understand the law [110] to be.

Mr. Collins: I would like to have until tomorrow morning to cite you additional authorities directly in point.

The Court: As I say, if they show that a Pullman car was purchased from a reputable company, although at the time of the accident it gave way, it wasn't sufficient to protect the public, I do not think that that is the law.

Mr. Collins: Of course I agree with you, but I would like to have the opportunity to convince you through the words of the higher courts, if I may have until tomorrow morning.

The Court: To cite a case like you have here, where you use an appliance, such as in this instance a club, which you furnished this man and gave him to use, and the only thing he can use it for is to help run your

road, and it gives way at the time, and the defense was because it was purchased from a reputable company that therefore you are not liable, why I cannot understand that that is the law at all.

Mr. Collins: I read it to you from the Circuit Court of Appeals decision.

The Court: Let some other Court of Appeals rule on it. I do not understand that that is the law at all.

You may proceed. I have ruled. I have sustained the objection. I am satisfied that that is the responsibility of a railroad company, to furnish efficient, safe equipment to [111] protect the public and its employees in its operation.

Mr. Collins: You mean an absolute duty? Is that what you mean?

The Court: They have to furnish it because here a man who had a club that you purchased for him, he used it, it broke right in two — we have it in evidence here — and now you come in and say, we will show we bought that club from a reputable company and we have the right to rely on it, that is your defense, that is not the law. The way I understand it, it is not the law and I never rule that way.

Mr. Collins: I can't help that. I still agree with that decision.

The Court: It is natural for lawyers to disagree with courts. That is only natural. But fundamentally that is not right and that is not the law as I understand the law.

Mr. Collins: I do think that your Honor is rather arbitrary.

The Court: I am not arbitrary at all.

Mr. Collins: To give me until tomorrow morning to produce additional authorities to show my position is not only right but tenable.

The Court: I have gone over these matters before, counsel.

Mr. Collins: So have I, for 30 years.

The Court: That does not make any difference. I have [112] gone over them and I have ruled in cases where a Pullman car was defective, went to pieces, and the railroad company was held liable in that case. Here you have a club that is being used, it breaks while this man is using it, an employee, and your contention is that the railroad company is not liable because they purchased it from a reputable manufacturing company.

Mr. Collins: I am showing that we used reasonable care in furnishing the appliance.

The Court: Do you claim that that is reasonable care and that that is a defense?

Mr. Collins: I think that is one of the defenses, showing reasonable care. It isn't the whole defense.

The Court: If I permitted this, that you were not responsible because you purchased it from a reputable company, therefore the company really shouldn't be held liable, that would be your argument if I permitted evidence on that, I do not understand that that is the law at all, gentlemen.

Mr. Collins: May I have until tomorrow morning to give you additional authorities?

The Court: Have you any authority of the Supreme Court of the United States?

Mr. Collins: There is one referred to here that I would like to go and look up and see what it says.

The Court: I never heard of it before, that that is a [113] defense. I never heard of it before, because you could never recover against a railroad company if they can come in here and show that they purchased from a reputable company the appliance and rely on

that and therefore if the public or an employee is injured by reason of its defectiveness at the time, then under your contention there can be no liability because of this purchase from some reputable company or manufacturer.

Mr. Collins: If your contention is correct, then the minute the club breaks the doctrine of res ipsa loquitur comes in and the presumption of negligence arises.

The Court: I am just saying that the railroad company is liable at the time of an accident if its equipment is defective and is the proximate cause of that accident. I say that that is fundamentally the rule. That is my ruling.

Mr. Collins: Your Honor hasn't told me whether I may have until tomorrow morning to cite further authorities.

The Court: Well, it is 20 minutes to 4:00. I will give you until tomorrow morning, but I will tell you that my mind is in that condition now. If you want further time until tomorrow morning I will give you until tomorrow morning.

Mr. Collins: Thank you.

The Bailiff: Shall I bring the jury down?

The Court: Yes.

(The jury returned to the courtroom at 3:45 [114] o'clock p. m.)

The Court: I will state to you, ladies and gentlemen of the jury, that we will take a recess until 10:00 o'clock tomorrow morning. You are excused until then. Remember the admonition.

(Whereupon, at 3:45 o'clock p. m., a recess was taken until 10:00 o'clock a. m., August 28, 1947.) [115]

Los Angeles, California; August 28, 1947;
10:00 o'clock A. M.

Mr. Collins: Your Honor please, the witness on the stand I would like to, if you don't object — counsel does not object — withdraw him and put one witness on who is a businessman.

The Court: Yes, but I have to dispose of this objection that is before me.

Mr. Collins: Yes, your Honor.

The Court: Since adjournment last evening I made a further examination of the pleadings and the Federal Employers Liability Act, under which this suit is brought, and I discover in the complaint that the plaintiff alleges, as a specific act of negligence, that the defendant did not use ordinary care in providing him with a safe appliance, which is this brake club, with which to perform his work, and therefore the plaintiff alleges that that was the act of negligence.

Now the defendant takes issue with the plaintiff in his answer, denies that fact, so the question of ordinary care is of course an issue of fact to be determined by the jury. That being the case I will modify my ruling sustaining the plaintiff's objection to asking the witness who was on the stand the question as to from whom this brake club was purchased and its condition. I think they have a right to go into that, as to whether they used ordinary care and if it was safe, [117] which is an issue of fact to be determined by the jury. So I will modify the ruling, for the record.

The objection was made and I sustain the objection. I will overrule the objection and permit the witness to answer.

Mr. Collins: Mr. Brobst, rather than call the witness back, if you will take my word for it that the answer would be the Turner, Day & Woolworth Handle Company?

Mr. Brobst: Yes, Mr. Collins.

The Court: That is his answer?

Mr. Brobst: Yes.

Mr. Collins: That is a division of the American Cork and Pulp Company. I will verify that later on when he comes back.

Mr. Brobst: All right.

Mr. Collins: Now if I may be permitted to call a witness out of turn?

The Court: Very well.

Mr. Collins: Mr. Knight, please.

KENNETH W. KNIGHT

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Kenneth W. Knight. [118]

Direct Examination

By Mr. Collins:

Q. Mr. Knight, what has been your business over the last 10 years?

A. I have been connected with wholesale hardware.

Q. Were you a purchasing agent?

A. I have been connected with purchasing wholesale hardware for the last five years.

Q. And in connection with that position of yours, did you have occasion to learn from the trade the reliability or the reputation of various manufacturers?

A. Yes, sir.

(Testimony of Kenneth W. Knight)

Q. I ask you whether or not you are acquainted with Turner, Day & Woolworth Handle Company, which is now a division of the American Cork and Pulp Company?

A. I am.

Q. Over what period of time?

A. Directly for two and a half years as assistant to the purchasing agent at the California Hardware, at which 100 per cent of our handles were bought from Turner, Day & Woolworth.

Q. I assume you have also had transactions or correspondence, together with consultation with other manufacturers of hardwood handles, such as brake clubs, axe handles, hoe handles and such? [119]

A. Yes.

Q. I will ask you whether or not by reason of your experience in the relationship with the trade whether the Turner, Day & Woolworth Handle Company is a reputable firm. A. Yes, they are.

Q. And can you state whether or not it is a manufacturer of recognized standard among the trade?

A. That is right; they are.

Q. And in your opinion will you state whether or not that manufacturer is a company that can be depended upon to produce, I should say send to the trade, reputable, substantial standard products which you purchase from them?

Mr. Brobst: I will object to that question, your Honor, on the ground it is argumentative. I have no objection to the reputation but whether they can be depended upon is argumentative.

The Court: I think it is argumentative. Sustained.

(Testimony of Kenneth W. Knight)

By Mr. Collins:

Q. What, in your opinion, is the reputation and dependability of the Turner, Day and Woolworth Handle Company?

A. They have a reputation of furnishing a first-rate handle of all types.

Mr. Collins: You may cross examine.

Mr. Brobst: I have no questions.

(Witness excused.) [120]

Mr. Collins: Will you have Mr. Graham resume the stand?

ROBERT ADAM GRAHAM

recalled as a witness by and on behalf of the defendant, resumed the stand and testified further as follows:

Direct Examination (Continued)

By Mr. Collins:

Q. You have been sworn before, Mr. Graham?

A. Yes, sir.

Q. I think yesterday you stated you were employed by the Southern Pacific Company? A. Yes, sir.

Q. In what capacity?

A. Assistant chief chemist.

Q. I will ask you whether or not you have under your supervision the testing of all brake clubs which are purchased by the Southern Pacific and subsequently distributed to the various points where they are used.

A. Yes, sir.

Q. How long have you been with the Southern Pacific? A. Thirty-four years.

Q. Will you tell the jury—

A. Pardon me, 24 years.

(Testimony of Robert Adam Graham)

Q. Will you tell the Court and jury, if you will, what has been your education?

A. High school, business college, and I started in the [121] mechanical department of the S. P., the superintendent's office, and I transferred to the chemical laboratory.

Q. How long did you study in the chemical laboratory?

A. I was classed as laboratory assistant and typist. In those days the office work didn't take a great deal of time. I was making routine tests in the laboratory, oils, and occasionally testing handles and steel.

In 1937 I went direct to the inspection of material purchased for the S. P., and every purchase the Southern Pacific makes they demand inspection before it is used.

Q. Now with respect to brake clubs, do you personally supervise the inspection of all shipments of brake clubs? A. I do.

Q. And all brake clubs when they go out on the system have been personally inspected by you, is that correct? A. That is correct.

Q. Now will you tell the jury, or state to the jury if you will, please, how the inspection is made, what procedure is used?

A. We get notice from our store department that a new shipment has been received. It is a special form that is submitted to us. We go over to the storehouse and pick at random 20 per cent of the shipment of the brake clubs, either in crates or sacks.

Mr. Brobst: I will object to the testimony, your Honor, [122] in view of the fact that he states that

(Testimony of Robert Adam Graham)

20 per cent are inspected; unless his inspection is limited to the club in evidence it would become immaterial.

The Court: I think that that has some relevancy as to just what the company does in using ordinary care. Overruled.

By Mr. Collins:

Q. Do you take each shipment as it comes in, is that correct? A. That is correct.

Q. And before any of the clubs are shipped out, in so far as any particular shipment is concerned, do you stamp that shipment as having been inspected by you?

A. We have to.

Q. I want you to go into detail as to the method of inspection, the tests that you make—just a moment before we ask that question.

Do you make an inspection of each club in the shipment? A. No, sir. That is impossible.

Q. Now state to the jury in detail the inspection that you make, whether it is one or two kinds, whatever you may do.

A. After visible inspection of the shipment is taken at random, six clubs out of each shipment are brought into the testing laboratory.

Q. How many in a shipment?

A. It depends on what the order is, according to their [123] consumption.

Q. You take a percentage?

A. Yes, sir. There is one correction. I said 20 per cent. It is one out of every 20, which is equal to 5 per cent. That is universal testing practice.

(Testimony of Robert Adam Graham)

Q. Now state what you do.

A. We bring these clubs into the laboratory, check them for their breaking strength, their deflection from the center axis; in other words, we place them in a large machine that fixes the end of the club and the handle end is raised with a traction dynamometer—is similar to a scale—and the force exerted on that club is measured. We measure the actual breaking strength of the club.

We also measure the deflection of the club from the time we start the test to the first evidence of breakage.

When what we have found constitutes a good club we hold to that standard.

Q. What pressure do you exert upon a club, or I should say what pressure do you insist a club should stand before it is passed or before any of that shipment is passed? A. At least 500 pounds.

Q. Now in the event you find a defective club from the tests which you make from a shipment, then what if anything do you do?

A. We return to the shipment and go through them very [124] carefully because we allow no defects in a brake club.

Q. You mean by that that if you find in the entire shipment just one club you condemn that shipment until further inspection?

A. Well, we wouldn't condemn it, we would go through it ourselves, or at least go through another 5 per cent. If we found a second one we would go through the entire shipment.

Q. Now when you make this test, can you make a test such as you have described on each and every club in the shipment? A. No, sir.

(Testimony of Robert Adam Graham)

Mr. Brobst: I object to that, your Honor. That is a question for the jury.

Mr. Collins: That is merely preliminary, if your Honor please.

The Court: Overruled. It is preliminary.

By Mr. Collins:

Q. You say you cannot? A. No, sir.

Q. Now will you state to the jury why you cannot make a test on each and every club in the shipment to determine its tensile strength?

Mr. Brobst: I will make the objection to that also, your Honor. That is invading the province of the jury.

The Court: Overruled. [125]

The Witness: Well, if you tested every club—when we test them we destroy them for further use. I think that answers it.

By Mr. Collins:

Q. In other words, when you make a test on a club that club cannot be used? A. It cannot be used.

Q. And if you made a test on each and every club it would destroy the entire shipment?

A. That is right.

Q. I take it then that you select at random 5 per cent of the clubs and make a test to determine whether or not they break at less than 500 pounds pressure?

A. Yes, sir.

Mr. Brobst: Are you going to put them all in evidence, counsel?

Mr. Collins: I don't know. I will have to ask him something about them.

Mr. Brobst: I have no objection to the pictures, your Honor.

(Testimony of Robert Adam Graham)

By Mr. Collins:

Q. I wonder if you will put these pictures in order, commencing at the beginning of the test, so that we may mark them one after another if they are admitted in evidence? A. There are three to a set. [126]

Q. Which are the first three?

A. These. They are numbered.

Q. These are just extra sets? A. Yes.

Mr. Collins: Do you want an extra set of these for your files, counsel?

Mr. Brobst: No, I don't think so.

By Mr. Collins:

Q. State whether or not in your experience the procedure which you follow with respect to inspection of shipments of brake clubs is the procedure which is generally followed and considered good practice throughout the railroad industry.

Mr. Brobst: I will object to that, your Honor. That is not the test.

The Court: Sustained.

By Mr. Collins:

Q. I hand you laboratory test No. 424-1. State what that represents.

A. That represents a handle as set up to make the original first test. It is a new handle. This is a big Olson test machine that we use to hold the club firmly in blocks there. This is a chain hoist with a traction dynamometer, which is equal to a scale.

Q. This is the gauge up at the top?

A. This is the gauge, yes. By the pull it registers [127] the pounds.

(Testimony of Robert Adam Graham)

Mr. Collins: Can we mark "G-1" as the position of the gauge?

Mr. Brobst: Whatever you say is all right.

The Witness: And we have here a steel rule indicating how far the center of the handle is from the floor. Force is applied by the chain hoist, raising the handle into a position as shown.

By Mr. Collins:

Q. Just a minute. That hoist is then in a position to raise the handle? A. To start the test.

Q. The test has not been commenced?

A. No, sir.

Mr. Collins: I offer this in evidence as defendant's exhibit next in order, your Honor.

The Clerk: That will be defendant's Exhibit A.

The Court: Admitted.

(The photograph referred to was received in evidence and marked Defendant's Exhibit A.)

Mr. Collins: May I hand it to the jury, if your Honor please? The Court: Yes.

(The exhibit referred to was exhibited to the jury.)

Mr. Collins: I understand, if your Honor please, under [128] the new rules no exceptions are necessary to be noted.

The Court: If that is the new rule, everything will be excepted to.

Mr. Brobst: Counsel, why not admit the whole series as one exhibit and pass them to the jury at one time so we can save time?

(Testimony of Robert Adam Graham)

By Mr. Collins:

Q. What is this laboratory test No. 424-2? Will you explain it to the jury in detail?

A. It is a close-up view of the point of application of force. It shows the end of the handle, where a bolt is placed through the center so the handle will not slip in making the load application.

Q. What is this ruler off at the end?

A. This rule is for measuring the height from the floor. This is more or less to give you an idea how far in from the end of the handle that the load application is made.

Mr. Collins: I offer this as defendant's exhibit next in order.

Mr. Brobst: Why not admit it as one exhibit?

Mr. Collins: I would rather keep them separate.

The Clerk: Defendant's Exhibit B in evidence.

(The document referred to was received in evidence and marked Defendant's Exhibit B.) [129]

By Mr. Collins:

Q. Now laboratory test No. 424-3, will you explain what that picture shows?

A. That picture shows the club after load has been applied but before fracture. You will note that it is deflected from the center line of the axis about six inches.

Mr. Collins: I offer this as defendant's exhibit next in order.

The Court: Admitted.

The Clerk: Defendant's Exhibit C in evidence.

(The photograph referred to was received in evidence and marked Defendant's Exhibit C.)

(Testimony of Robert Adam Graham)

Mr. Collins: I will pass these to the jury.

(The exhibits referred to were passed to the jury.)

By Mr. Collins:

Q. Now, Mr. Graham, will you examine the brake club that is before you?

By the way, that club has not been introduced in evidence, if your Honor please.

Mr. Brobst: Yes, I put it in.

The Clerk: It is plaintiff's Exhibit 1.

By Mr. Collins:

Q. Will you make an examination of plaintiff's Exhibit 1? A. Yes, sir. [130]

Q. Have you already examined it? A. I have.

Q. Have you examined it in the laboratory at Sacramento? A. I looked at the fracture.

Q. I will ask you whether or not, outside of putting this club in a machine such as you have demonstrated in defendant's Exhibits A, B and C, whether or not there was any way to determine whether or not there was any flaw in this club. A. No, sir.

Q. I will ask you whether or not the wood from the outside would pass inspection, or would you have passed it as a good and sufficient club? A. I would.

Q. How can you tell the jury in your opinion what caused this club to break?

A. Not knowing how it was applied, from the appearance of the wood itself, rather short in fibre, which an inspection couldn't tell without breaking, there is no surface indication. The short end fibre means it is a little bit weak. In combination with the application it

(Testimony of Robert Adam Graham)

might have caused a failure. I notice here some new gashes and the method of applying it might not have been the proper manner.

Q. But in any event of course you don't know how it was [131] applied? A. No.

Q. There is no way of discovering the defect of this club prior to the time it was broken other than taking the club and putting it in a machine and breaking it in half? A. No, sir.

Mr. Collins: You may cross examine.

Cross Examination.

By Mr. Brobst:

Q. How much pressure does the ordinary brakeman exert on a club such as that?

A. That is something that has never been determined.

Q. You have never determined that?

A. No, sir.

Q. Yet you say that a safe test would be 500 pounds?

A. That is what we have taken for granted.

Q. Have you just fixed that standard without knowing how much pressure the ordinary man exerts on one of these during the course of his ordinary work?

A. Well, I am not in that department. I wouldn't know unless I actually made tests.

Q. Then you just determine these things are safe by some standard that is given to you?

A. So many factors enter into it, your deflection, your braking load. Of all the tests made the average is 800 [132] pounds per club. It varies according to the clubs.

Q. You said 500.

(Testimony of Robert Adam Graham)

Q. 500 is the minimum. Anything below 500 we wouldn't accept.

Q. But you fix that standard without knowing what the requirements are of the men in the field, how much pressure they exert when they have to fasten up one of these brakes? A. That is not known.

Q. So then actually you don't know whether it is safe or not out in the field because you don't know whether or not they exert more than 500 pounds when they have to tighten up one of these brakes on freightcars on a grade?

A. The only thing we can go by is the past record to get the best handle we can.

Q. After a brake club has been used and put back you don't then give it a second test, do you?

A. No, sir.

Q. What use it has been subjected to you have no way of determining? A. No.

Q. Then the supply man on the job gives it no test?

A. I don't know.

Q. So that it is used, or rather it is put back in a can and no matter what its condition is it is put back for the other men to use? [133]

A. That is out of my department.

Q. You don't know anything about that?

A. Not the road use.

Q. As far as any test is concerned at the actual scene where the club is used and reused, you know nothing about those tests? A. That is right.

(Testimony of Robert Adam Graham)

Q. And these clubs are sent out as being safe when you take one out of 20 and if it passes inspection the other 19 go out to be used?

A. That is universally accepted with all inspection.

Q. Whether or not they are going to exert more than 500 pounds on each club, you don't know that?

A. No, sir.

Mr. Brobst: That is all.

Mr. Collins: That is all.

(Witness excused.)

Mr. Collins: Mr. Estes.

LESLIE ARTHUR ESTES,

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Leslie Arthur Estes.

The Clerk: How do you spell your last name?

The Witness: E-s-t-e-s. [134]

Direct Examination.

By Mr. Collins:

Q. Mr. Estes, your business is what?

A. Head buyer.

Q. For whom? A. Southern Pacific Company.

Q. Over what period of time?

A. I started in 1913 and for the past 15 years approximately I have been head buyer.

Q. Do you have under your supervision the purchasing of brake clubs? A. Yes, sir.

(Testimony of Leslie Arthur Estes)

Q. For what period of time?

A. Possibly 15 years.

Q. From whom do you purchase those?

A. Throughout that period we have been buying from the Turner, Day & Woolworth Handle Company.

Q. Have you had occasion to discuss the purchasing of brake clubs from other firms?

A. Yes, sir. During that period other concerns have desired and have submitted prices on brake clubs that in some cases have been lower than the brake clubs that we buy from Turner, Day & Woolworth, but we have refrained from considering such purchases due to quality that we have been getting from Turner, Day & Woolworth Handle Company. [135]

Q. In the trade, do you know anything about the reputation of Turner, Day & Woolworth Handle Company?

A. To my knowledge they are considered one of the leading tool handle manufacturers.

Q. When you say tools, are you including brake clubs?

A. That answer includes brake clubs; yes, sir.

Q. Now do you know whether or not they are a manufacturing concern of recognized standing?

A. Yes, sir.

Q. I will ask you whether or not, in conjunction with the United States Department of Commerce, or with the United States Department of Commerce you carried on an investigation and recommendation as to the kind of wood to use in brake clubs and other wooden instrumentalities.

Mr. Brobst: I will object to that as immaterial, your Honor.

(Testimony of Leslie Arthur Estes)

The Court: Why is that material?

Mr. Collins: To show we have complied with those rules.

Mr. Brobst: That is immaterial as to what rules they comply with.

The Court: He may answer.

By Mr. Collins:

Q. Will you answer, please?

A. Would you repeat the question?

(The question referred to was read by the reporter as [136] follows:

("Q. I will ask you whether or not, in conjunction with the United States Department of Commerce, or with the United States Department of Commerce you carried on an investigation and recommendation as to the kind of wood to use in brake clubs and other wooden instrumentalities.")

The Witness: That is a fact.

By Mr. Collins:

Q. I will ask you whether or not this is—counsel has agreed I need not have this certified to.

The Court: Very well.

By Mr. Collins:

Q. —if this is the United States Department of Commerce, under direction of Henry A. Wallace, National Bureau of Standards, which was put out by that department with reference to hickory handles.

Mr. Brobst: I will object to that, your Honor, unless it shows that it pertains to brake clubs.

The Court: Yes, if it relates to this brake club.

(Testimony of Leslie Arthur Estes)

Mr. Collins: I don't think it mentions brake clubs specifically. It has to do generally with hickory handles.

Mr. Brobst: Axe handles and things of that kind which I don't think apply here.

The Court: Sustained. [137]

Mr. Collins: I wonder if we could have a 10-minute recess while I read this over and see if there is some question or if it is admissible, your Honor. It is quite long and I just received it this morning.

The Court: Very well. We will take a recess for 10 minutes.

(Short recess.)

The Court: I will overrule the objection.

By Mr. Collins:

Q. I will ask you whether or not the handles which you purchase comply with these recommendations.

A. I couldn't intelligently answer that because the handles that we purchase are to our own specifications.

Q. Now the specifications used by the company, are they equal to or better or different?

A. That is something that our mechanical department would have to tell you.

Mr. Collins: I withdraw the question, if your Honor please. You may cross examine.

Mr. Brobst: I have no questions.

The Court: You are excused.

(Witness excused.)

Mr. Collins: Your Honor please, I may have one witness who is on his way up here, and he will be a short witness, not over four or five minutes. [138]

The Court: Is there any other witness you can use?

Mr. Collins: No, I haven't. That will be the completion of our case.

The Court: We will take a recess.

(Short recess.)

Mr. Collins: Your Honor please, may we now pass the club to the jury?

The Court: Yes.

(The exhibit referred to was passed to the jury.)

Mr. Collins: The witness is here, your Honor please, but he did not have the information I wanted, so I have excused him. However, I want to ask the plaintiff one question after the jury has examined the club.

The Court: Will counsel approach the bench a minute?

(Conference between court and counsel at the bench outside the hearing of the jury.)

The Court: I understand the defendant rests?

Mr. Collins: The defendant rests.

The Court: Do you have any rebuttal?

Mr. Brobst: No rebuttal, your Honor.

The Court: Both sides rest? (Assent)

Proceed with the argument. You are not limited in the argument, gentleman. You can have whatever time you want.

OPENING ARGUMENT IN BEHALF OF THE PLAINTIFF.

Mr. Brobst: If the Court please, and ladies and gentle- [139] of the jury: This case, as I pointed out in my opening statement, is one that is very simple upon its facts. We have alleged here that the defendant company did not exercise reasonable care in supplying this man with a safe brake club, and because they didn't supply him with a safe brake club it broke and he was injured.

Now at the outset I want to say this to you: As far as the brake club is concerned, that is an instrument or a tool that must be safe or it becomes highly dangerous to life and limb. It is a fortunate thing in this case that the cars were practically to a stop at the time the club broke. If you can imagine for a moment, these men must go out and work in all types of weather, under all types of conditions, on all kinds of moving cars, and climbing up and down and using this club to set brakes on moving cars, so that his life depends and his limbs depend upon being given the tools to work with. And I was amazed this morning when they came in here and testified that they gave these clubs a 500-pound test and declared them to be safe when they didn't know how much force was exerted in the field by these men setting brakes on those heavy freight cars. They simply take an arbitrary figure and say that an instrument is safe when they don't even know the amount of strength and pressure that is used in the field by the workmen.

It seems to me that if they are going to be reasonably [140] safe, if they are going to give the men a fair chance to come out whole, they should at least have

a supply man or a man with experience who could put the club in between two even and give it a shove and a pull to see if it would stand the strength of the ordinary man. If it does, then it would be, I presume, some kind of a reasonable test. But they take one club out of 20 and if it stands 500 pounds of pressure, and they don't know how much they use in the field, they send the clubs out to be used without any further inspection. The supply man doesn't even lift them up to feel the weight.

I want to call your attention to this: Yesterday I brought in as a witness Mr. Jacobs. I never met the man in my life until yesterday. I walked into court with him and you jurors saw him come in here. I didn't take him out to the witness room. I asked him, would you look at the club and see if there is anything wrong with it, and I handed it to him. He handed it right back and said, "It is too light. It will break." And I said, "Take the witness stand."

You saw that. I asked him no more questions than that. He is a man of 40 years' railroad experience. He is a man who works in the yard. He is a man that pulled on those brakes, and a man who used that type of club, and it took him not more than three seconds when the club was handed to him to say that it was too light, that it would break.

Now why can't a supply man do that? Why can't he feel [141] them and test them before he puts them in the can? They don't even give them a test after they have been used and put back for the men to take out again. They come in off the road, they have been used, you don't know what type of use they have been given, you don't know what strains they have been put to, and

they put them back in the can and the brakemen have to use them again.

And why do they have to use them? Because these brakes will not work efficiently unless they use a club. So they are compelled to use the club that is not given any kind of an adequate test.

They will say, "Oh, we buy these out in the market from some manufacturer and we just take his word for it." They didn't even bring in testimony to show that this company guaranteed that those clubs were safe. They simply buy them on the market from a company that sells axe handles and puts them out for the men to use, taking one out of 20, giving it a 500-pound test, when they don't even know if these men exert 700 or 800 pounds. When a man has to tie down three freight-cars he will exert more than 500 pounds. Then if he doesn't stop the train, it may knock somebody off and they are killed. And they blame the man. They don't give him a strong enough club to hold it.

The club itself proves the point. If it was safe enough it wouldn't have broken right square in the middle. It is [142] just as clean a break as can be. Just as Mr. Jacobs said when he picked it up, and I put it in his hand, he just took it like that and said, "This is too light, it will break." And it broke right square across the grain.

Certainly he is no wood expert but he is a man who worked for 40 years for the railroad and a man who knows break clubs because he has had to pull on them.

Now if Mr. Jacobs' testimony were not correct they would have had a railroad man in here who used those clubs down in the freight yards to tell you that that was

a good and sufficient club. But where is one man produced by the defense who has to use those clubs down in a yard who has come in to testify that that would be a good usable club, and that its deficiency could not have been detected by someone experienced in the use of clubs? They can't produce one man or they would have had him here, believe me. But all that they can produce here is that they bought them on the market, paid a fair price for them and gave them a test which they didn't know was sufficient or not, and then send this man out to work with it.

Now there is another point involved here, and that is the question involved here, and that is the question of the efficiency of the brake, and the Court will—I don't know whether it will or not, so if the Court instructs you on the question of the sufficiency in the efficient operation of the [143] brakes—

Mr. Collins: Your Honor please, I will have to object to going into any question as to the sufficiency of the brake because that is not involved in this suit.

Mr. Brobst: The statement I am going to make is simply this, that if the Court instructs on that I want the jury to pay careful attention because the rules on efficient operation of a brake are entirely different from the rules that require you to prove ordinary care. But I don't think you even need to apply that stringent law here, when they admit on the witness stand that they didn't know how much strength that club was required to have to be safe to be operated by a man out in the field tightening brakes. It is just common sense. I was amazed that they offered such type of testimony as a defense.

Now I want to pass for a moment to the question of the injuries and the question of damages. The plaintiff in this case is not critically injured. He has a severe injury, I will say, an incapacitating injury. It isn't one where I would come in here and say that it is worth $50,000 or $60,000, or something like that—that is ridiculous—but I want you to look at the situation from this standpoint: This man is a working man. He earns his living by the use of his hands and by the use of a sound body. And when you think of the injury which he received, think of it in terms of the [144] work that he has to do. Relate his injury to his work. Sometimes a severe injury is not as damaging to one as a mild injury because a mild injury may prevent work.

I have in mind this example: You take this illustration (and I think it is a good one), take the Army flier, the Army ace. The slightest nose cold, which is to us something we can go about our ordinary affairs with, the nose cold will ground him. Sometimes they won't tell, but as soon as the medical department finds that the cold is present the man is grounded because it affects his ears and his equilibrium. That isn't very serious, yet it takes that man completely out of his field of work.

Now you take in this particular instance of Mr. Carson. He has to climb up and down on moving boxcars, he has to do heavy pulling on brake clubs, and so his back is injured so that he can't climb and he can't do that heavy pulling. Certainly he can walk around. He is ambulatory. It doesn't prevent him from carrying on those things. But it does prevent him from doing that heavy type of work.

Now let's trace his injury for a moment. He was up there pulling on that brake club and it broke, and

he swung around and hit the tank car. He went to the Southern Pacific doctor at Tucson, and the Southern Pacific doctor immediately began to give him heat treatments and diathermy. There was no response evidently to that type of treatment, so they took [145] his tonsils out. Why they took his tonsils out, I don't know. Mr. Carson didn't consent to it, but they evidently were not getting any results by the treatment that they were giving, although they had X-rayed him, so they took out his tonsils.

All right. Then after that months went by of treatment, and still no response, even though he had lost his tonsils. So they send him up to the General Hospital in San Francisco. They look at him and say, "Well, it is your teeth," and even though they took X-rays they pulled out three of his teeth. And what happens? Still no improvement.

So as a result of the accident he still has a sore back, he has lost his tonsils, he has lost three of his teeth, and now they come into court and say the proper treatment is to put a belt on him. How do we know whether the belt treatment is going to be any more satisfactory than the removal of the tonsils, the pulling of the teeth and the diathermy treatment? To none of those has there been a satisfactory response medically.

Now they come in and blame it onto something that he has had since birth. As you listen to these cases and the medical defense by the defense doctors you will find several defenses. Although a person works right up until the time of the accident, it is a most peculiar thing that when you have an accident and you can't go to work just at that same time your teeth become bad, your

tonsils become bad, you develop [146] arthritis and you have had that condition since birth. You will find those just routine in cases that you try. So now they are down to the last one, the only one they have left, which is that he had it from birth and that the only way to treat it is to wear a belt.

Well, I don't know. We had Dr. McReynolds on the stand. He did say that a degenerative process had taken place in there over a period of time and that he did have a weakened back. But he was able to work right up until the time he was hurt. And it aggravated it, and he felt that there was some nervous irritation there, and the reason he felt there was some nervous irritation there was because of atrophy in the left leg.

Dr. Sutherland did not deny the atrophy in the left leg. He was on the witness stand, and counsel went into it in detail with Dr. McReynolds, and he did not deny it by Dr. Sutherland, he didn't dare ask Dr. Sutherland because it was there and it was present and it was abnormal, showing a nerve injury.

I don't know what is wrong with this young man right now, and I think Dr. McReynolds gave a very honest opinion when he said he thought there was some nerve injury, that six and a half or seven months have gone by, with all the routine treatments and more, he has had his tonsils out, he has had his teeth out, he has had this diathermy and he has had all [147] of the recognized treatments, and yet he is not well. Now

they will say he has gone back to work. He has gone back to work and he has worked two or three days and then he has lost two or three days.

Now bear this in mind, please, that this man is not covered by workmen's compensation. This man has brought his suit under the Federal Employers' Liability Act, the only way he can get one nickel by reason of his injury, and the moment that he is unable to work by reason of this accident he is deprived of money to keep body and soul together.

So at the end of six months time without earnings, when it requires as much as it does to live in these times, what else can he do? Sure, these things are prolonged out like this in trial and other ways so that the man is forced to go to work.

As far as the amount of damages is concerned, he has lost six months time absolutely. I think it figures out approximately $250 a month that he has lost. I think that figure is somewhere in the neighborhood of $1500 actual loss of wages.

But I don't think that that amounts to a pittance compared to what his future might be. Granted he had a weak back, granted he had something the matter with him from birth, he was all right until that brake club broke. He was earning $250 a month and when it broke now he can't go back. [148] Bear this in mind, that any job that this man undertakes, any company he goes to work for, he has to pass a physical examination, and

now he has a weak back. He has one that is injured. It is difficult for him to pass those physical examinations to continue on and compete in the labor market with those who are whole and not injured. And, as Dr. McReynolds says, the length of time it will need to repair that condition, he can't estimate it until he has been given this belt treatment, and neither the Southern Pacific doctor in the Tucson nor the Southern Pacific Hospital in San Francisco ever gave him any belt treatment. It is no fault of his own that he is where he is.

Now he is entitled, in addition to the compensation that he has lost, to the impairment in the earning capacity; he is entitled to the pain and suffering that he has undergone. Those are all elements and proper elements of damage. I don't know how much this case is worth, and I won't venture a guess. I will say this, that it isn't worth any $25,000 or $50,000, or anything in that category, but I do say that he is substantially damaged. I do say that he has a back that is going to bother him. I do say he is disabled so that he can only earn about one-half of what he has earned until his back gets back to where he can work, and when that will be I don't know, and Dr. McReynolds would not give you an opinion, and Dr. Sutherland says that he requires a belt. [149]

I think with all those facts before you that the plaintiff is entitled to a good and substantial verdict at your hands.

ARGUMENT IN BEHALF OF THE DEFENDANT

Mr. Collins: If your Honor please, ladies and gentlemen of the jury: The amazing thing about counsel's argument is that he speaks about taking examinations from other companies for the purpose of obtaining employment. It is my understanding that the gentleman is still employed by us and still expected to remain in our employment and we expect to keep him.

He spoke about his inability to work. Well, the plaintiff told you himself that he worked the last week preceding this trial. On the other hand, counsel says he can't do that heavy work such as going up and down cars when out of the lips of the witness himself he said, "I did go back to work and I worked continuously the last week."

Dr. McReynolds says he had a degenerative condition between the fifth lumbar and sacrum which is of long standing. He sat in the courtroom when Dr. Ross Sutherland said that it was a congenital anomaly before birth, and he didn't come back to the stand to deny it. All the X-rays were here. Yet counsel asks you to assess damages for a condition which the man was born with.

He said that Dr. McReynolds said there was an atrophy. He didn't say anything of the kind. He said there was a muscle [150] spasm when he moved, and he demonstrated it.

Counsel says that he was amazed that we didn't know the strength or the force which a man puts behind a brake club. No one can know that. How much force he can put on it and how much force you can is something else.

Let us commence this case and analyze it as to what the Southern Pacific Company did and what it didn't do, and then listen to the Court's instructions, particularly with reference to when we buy through a reputable firm. I think this company had a right to presume, even without inspection, that when they bought through a reputable firm that the firm would supply them a product which was fit for the purpose for which it was intended, and that in all probability that would have been sufficient inspection. You listen to what the Court says to you on that subject.

So we did buy from a standard, recognized, reputable firm supplying us with an instrumentality to be used by our employees. I think the Court will tell you about it, whether we had a right to rely upon it or not. I think we did. The Court will tell you whether we did or whether we didn't.

Even to the extent where we pay them more money than we had competitive bids for which were less because it was a better product.

In addition to that, the railroad company made a further inspection. They made an inspection of the club by examina- [151] tion which showed no defects. They then used an instrumentality in which they then made an additional inspection, placing pressure on it and if they found one club in the entire outfit that was bad, and they couldn't take each one of them and put it in the machine because that not only is unreasonable but it is impossible, you would break every club you had if you kept trying to find out where it was going to break. and if you pulled it to 500 or 600 pounds you would destroy the efficiency of the club because you would weaken it.

Then what was the next step? After they had been inspected and after we had purchased them from a reputable firm who represented to us that they were fit, and that is the presumption for the purpose for which they were manufactured, we still went to a greater length. We made our own inspection. We used an instrumentality taking one out of 20. You might say we could get one out of 10. But you take them as they are grouped, make your visual inspection and then we put them in the machine, which is standard all over the United States, as was testified to—

Mr. Brobst: I will object to that. That testimony was stricken out.

Mr. Collins: No, it wasn't.

Mr. Brobst: What others did by way of tests was.

Mr. Collins: He said it was standard. It was a voluntary statement and it was not stricken. [152]

The Court: You may proceed.

Mr. Collins: In other words, we have gone to a reputable firm, we have used standard tests for determining whether or not there was a defect. Now what are we charged with? We are charged that we did not use ordinary care in the selection of the instrumentality. There is no dispute but what we selected a reputable firm, an outstanding firm, according to the standards of the trade. There is no dispute that we went beyond that and didn't accept that as a finality, but we then took an instrumentality and performed our own test in addition to the right to rely upon a business firm selecting for us that which their product is supposed to be.

You gentlemen have been in business. You know how much you have a right to rely upon the products that

you buy, the products that you use in your business. Your automobile that you furnish your employees, do you go out and inspect every wheel and break every wheel to find out whether it is good or bad, or do you rely on General Motors or Chrysler to furnish you with a product which is fit for the purpose for which it was manufactured or intended to be used? That is what you do, or you wouldn't drive an automobile, or you wouldn't have a driver delivering groceries or hauling rock or hauling lumber. It would be impossible for you to function as a going business if you didn't rely upon those who furnished you with your instrumentalities, and you know it as well as I do. [153]

Now just how much ordinary care, additional care, do you use when you buy an instrumentality to use in your business or any other businessman? Do you go so far as to take one-fifth of the products furnished you and break them in half to see whether they are good? There isn't one lady or one gentleman in this jury box that ever saw or heard of any business breaking up the instrumentalities that they received when purchased in the regular course of business to see whether one in two or one in 500 is good or bad.

Now he speaks about inspection. The plaintiff in this case had a number of clubs to select. He said to you that he picked up this club and looked at it. There wasn't a thing on that club which would indicate to him, as an experienced trainman, that there was anything wrong with it, and therefore he used it.

Now when the plaintiff himself comes into court and tells you that he has selected a club which in his opinion, from the inspection, by visual inspection, the only instru-

ment that he had and the only way he had of knowing and the only way we had of knowing without breaking it in half, and if we broke every one in half we would have no brake clubs, he told you on the witness stand that the club was practically new, and the majority of those marks came on there from use of course.

Then counsel says to you that you must take that club back and break it in two to find out whether it is good so we [154] won't have any clubs to use. He is asking you to ask us to perform an impossibility. Our inspection showed it was good, the company that sold it to us said it was good, the plaintiff said it was good, and the man who was in the chemistry department said he could not tell, and no one could tell by looking at the club itself.

Then they brought in this man Jacobs, who is a representative of the Brotherhood, and counsel went on at great length here in telling you what a fine fellow he is. Sure he is a fine fellow for the use and benefit of the Brotherhood. I deal with them daily. I will put any one of them on the witness stand and ask him any question that will be beneficial by all odds to the injured man. I don't even need to discuss anything, and counsel didn't need to build up Mr. Jacobs. We know what his relationship is.

But that has nothing to do with the case. He picked it up. He didn't know what the weight of it was. He said, "It feels light to me." If he is an efficient yardman, as he claims he is. all he had to do was bring a scale and weigh it and tell you whether it was light or up to standard. Our boys told you it was up to standard.

So far as ordinary care is concerned, take yourself, any one of you, would you do any differently than we did

when we selected a manufacturer, a well-represented institution, an institution in which the entire trade believes in, to make a [155] product for you to run your business with, and after you have done that how much further would you go? Would you go as far as we did? Would you take the products that you had bought and purchased under the representation that they were good for the purpose for which they were furnished and break part of them to see whether they were good? You would not, and you wouldn't say to yourselves, I am guilty of negligence and I didn't use ordinary care in giving this man this brake club when, under his own testimony, he said the club looked good.

Would you or any one of you or any of your help that you are purchasing supplies for, wrenches, screwdrivers, break one in 20 to see whether the lot was good? You wouldn't go that far. and I know it, and you know it, ladies and gentlemen.

So on such testimony as this they ask you to return a verdict to buy a congenital anomaly from a man who has had it since birth and which their own witness, Dr. McReynolds, said there was a disintegration of the intervertebral disk and which had been going on for years and years. That is what he asks you to punish us for, punish us for using the best manufacturer in the country that we can get and use tests that we weren't required to use, and then say, here is a congenital anomaly, you ladies and gentlemen sell that to the Southern Pacific because he can't go up and down the cars when, under his own testimony, he says he went up and down the cars and [156] worked steadily during the past week, and that he had worked previously.

CLOSING ARGUMENT IN BEHALF OF THE PLAINTIFF.

Mr. Brobst: If the Court please, ladies and gentlemen of the jury: I was making notes so hurriedly here that my reply may be somewhat disjointed, but I think it will be very short.

You know, it is a peculiar thing when counsel argues this way. He says that they buy from a reputable concern and then he goes right ahead and says that they subject their materials to a test. Well, if they are so sure and rely so much on the man they purchase from, why do they test the clubs? Why do they test them? Because they know they have defective ones in them and they wouldn't use them without testing them.

Then defense counsel aims his entire argument at new clubs. This boy was using a used club and Mr. Collins himself says the strain of 500 pounds would destroy the efficiency of the club. Well, how does the man know that that may not have been subjected to 650 pounds or any number of pounds of strain and its efficiency destroyed? They don't make any test to determine that. They put it right back in the can and tell the man he must use it or his brakes won't work. The argument just isn't sound.

Now he says that the man went back and worked. Certainly he went back and worked. I told you, how is he going to [157] live? His injury certainly isn't such that it is so terrible that he can't stand it. Certainly he works. But it is painful. But he has to work. There is no way for him to make a living otherwise. The Southern Pacific is certainly not giving him anything unless he goes out there and works for them. So he will

go out and work, and they will pay him, and then they come in and condemn him because he has the fortitude to do it.

What they try to do here is to shift the blame from their own shoulders onto some manufacturer, and they still didn't refute the argument as to the weight of the club.

When they had their expert on who tested these clubs, they didn't ask him if the weight of that club was all right, they simply asked him if it wasn't the standard club, and he just looked at it and said yes. He didn't pick it up to weigh it or anything else. It seems to me that this is just one of those cases which the defense likes to prolong in hopes that they can get a man back to work, just as has happened here, and then they can come in and argue down damages. That is the old process.

If you and I, as a practical matter, if we were outside of a court and gathered around in the living room of someone's home, and we said that a friend of ours was out working and they gave him a tool to work with and he went out and exerted ordinary strength on it that he normally uses to tie a brake [158] and the club broke, now just as among us, whose fault is it that this man was hurt? There wouldn't be one of you that wouldn't say that the company is at fault because the thing was weak and unsuitable for the purpose because it broke. And that is all there would be to the case. There wouldn't be all these technical objections. There wouldn't be all the chemists in here and the big machines involved. It would simply be a practical question and a thing, why certainly the company should pay the man. He is out there working for them, earning them their dividends,

but when he is hurt, Lord forbid that he should get anything.

Now there is no affirmative duty on these men to inspect these clubs. They have a right to rely upon the fact that the club that they are given is suitable for the purpose for which they are going to use it. If they were to test every one out there as they go to work they never would have time to get their work done. They have to pick up the tools that are furnished to them, give a look at them, and go out and do their work, whether or not that had been subjected to a 500-pound strain which would destroy its efficiency, that should be determined by an S. P. man, a supply man who took it in after it had been used and before he put it back in the can.

As to its weight, that was easily determined by the experienced man. You saw that right here in the courtroom. I don't know Jacobs from anyone. They tried to discredit him [159] because he is a union man, because he is one of the Brotherhood men. That is because they can't destroy his testimony by legitimate means on the witness stand. If they can inject a side issue to try to destroy his testimony, they will do it, but the right way, and the correct way, and the honest way is to do it by a witness on the witness stand.

Now as far as the injury is concerned, I have stayed strictly within the record, and when he says that Dr. McReynolds did not say that the left leg was smaller than the right, that is not true, because he said that there was seven-eighths of an inch less on the left than there was on the right—I believe it was two and some-odd centimeters—and counsel asked him what a centimeter was and to reduce it to inches, and then when he has the temerity to get up here and say that he never men-

tioned that, I can't understand it. So help me if I misquote any testimony, you correct me.

Now, ladies and gentlemen of the jury, you have heard the medical testimony. You have heard the evidence. Just remember this, that this is this man's day in court. What he gets from this jury is every red cent or nickel that he will get. This is all. It is in your hands. The book is closed when you bring in your verdict and when he walks out of this courtroom. That is all that can ever be done for this man as long as he lives as far as this accident is concerned. He gets not another cent from workmen's compensation or any other [160] source for his injury. This is all that he ever will get. I submit the case for your decision.

The Court: Ladies and gentlemen of the jury, as there have been a large number of proposed instructions by counsel for the plaintiff and defendant which is going to require the Court some time to investigate them before presenting to you the instructions of the Court. I will conclude that we will adjourn until tomorrow morning at 10:00 o'clock before the case will be finally submitted to you and the instructions given to you by the Court. So you will be excused until then. But during this adjournment you will remember the admonition of the Court; you are not to form or express an opinion or to allow anyone to speak to you about the case or read about it in the newspapers until it is finally submitted to you tomorrow morning. You are excused until tomorrow morning at 10:00 o'clock.

(Whereupon, at 11:45 o'clock a. m., an adjournment was taken until 10:00 o'clock a. m., August 29, 1947.) [161]

Los Angeles, California, August 29, 1947,
3:30 O'clock P. M.

(The following conference was held in chambers between Court and counsel outside the presence of the jury:)

Mr. Brobst: Judge, on all of these instructions dealing with this question, the thing that strikes me is that this club was not a new club, but it was a used club, and whatever condition it may have been in when they bought it new seems to me to become immaterial.

Mr. Collins: Everything that is used becomes second-hand the minute you use it.

Mr. Brobst: I don't think they have any right to rely on what the manufacturer might have done in view of the fact that it was a used club. We don't know what use it has been put to and there was no evidence of any tests. It would seem to me then the question of what has happened to a new club is immaterial and outside of the issues.

The Court: The condition in which the brake club was at the time it was used is an issue of fact. That is the province of the jury and it is not for the Court to draw a legal inference. I think that is an issue for the jury. I admitted testimony as to its condition, where they got it, who made it, and all those things. Those are all right, but it is for the jury to say whether or not at the time it was used it was in a safe condition under that statute. This is a pretty broad [162] statute. this new law. If you study it over it is a pretty broad statute.

Mr. Brobst: Another observation, in those cases, when I read them last night, they were things that were

given to the company, for instance, the switch stand, and then in the Elliott case—I forget what the particular device was—but it was delivered to the company and the company gave the tests that the manufacturer asked for and the equipment was found to be in first-class working condition, and then the Court held that it wasn't necessary for them to take the thing apart and look inside, that if they followed the instructions and gave the tests recommended and it worked perfectly, that that was not necessary. But I don't see how that can apply here. And also in those cases there was a guarantee that the product was fit for the purpose for which it was to be used.

Mr. Collins: No, no.

Mr. Brobst: I have read the cases and in each one there was a guarantee by the manufacturer.

The Court: This instruction requires me to pass on the weight to be given to that testimony, and, as a matter of fact, I don't think I have any authority to do that.

We can proceed along because I am satisfied that I should not give this last instruction. I will take up the requested instructions of the plaintiff first and then those of the [163] defendant.

These are not numbered, but I am taking them in the order in which you have them here.

> "You are instructed that with regard to pain and suffering the law prescribes no definite measure of damages, but the law leaves such damages to be fixed by you as your discretion dictates and under all circumstances may be reasonable and proper. It is not necessary, therefore, that any of the witnesses should have expressed an opinion as to the

amount of such damages for pain and suffering, but the jury may make such estimate of the damages from the facts and circumstances and evidence by considering them in connection with their own knowledge and experience in the affairs of life."

Any objection to that, counsel?

Mr. Collins: Mine are in a different order.

Mr. Brobst: You don't have any objection to the damage instruction, do you?

Mr. Collins: None whatever.

The Court: Let us take them up in order.

Mr. Collins: I have no objection to that instruction.

The Court: I will mark it given.

Now the next one:

"You are instructed that you are the exclusive [164] judges of the weight and sufficiency of the evidence. You are not bound to decide in accordance with the testimony of any number of witnesses which does not produce conviction in your minds, against a lesser number. The direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact in a civil case."

I have another instruction along that line. There is no use repeating it.

Mr. Collins: One is sufficient.

The Court: That will be covered in the general instructions.

Now the next one:

"If you find from the evidence that the plaintiff is entitled to a verdict, you must not, in ascertaining the amount, resort to the pooling plan or scheme which has sometimes been adopted by juries for

fixing such amounts. That plan or scheme is where each juror writes the amount to which he considers the plaintiff is entitled, and the amounts so written are added together, and the total is divided by 12. This is a scheme of chance and no element of chance may enter into your verdict or into the determination of any question necessary thereto." [165]

I also have an instruction on that. That will be given.

Mr. Collins: No objection.

The Court: Now the next one: You are instructed that a portion of the Federal Employers' Liability Act in effect at the time of this accident, reads as follows:

"'Every common carrier by railroad * * * shall be liable in damages to any person suffering injury while he is employed by such carrier * * * for such injury * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defects or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.'"

Any objection to that? I will give that. That is the statute. I have checked the section.

Mr. Collins: I have no objection to that, as outlined in my statement. There isn't any roadbed involved.

The Court: It is just the language of the statute and I am instructing them more fully later on.

Mr. Brobst: The other sections are in there now, contributory negligence and assumption of risk.

Mr. Collins: And further that instruction should contain a provision, "unless you find that the plaintiff had contributory negligence." It has been held where you

take the statute [166] itself and give it without reference to the plea of contributory negligence that that is reversible error.

The Court: I give the statute later on about contributory negligence, that contributory negligence is no defense.

Mr. Brobst: It is hard to get it all in one instruction.

The Court: I am inclined to give that instruction on the statute.

Now the next one:

> "While it is encumbent on plaintiff to prove his case by a preponderance of the evidence, the law does not require of the plaintiff proof amounting to demonstration or beyond a reasonable doubt. All that is required in order for plaintiff to sustain the burden of proof is to produce such evidence which, when compared with that opposed to it, carries the most weight, so that the greater probability is in favor of the party upon whom the burden rests."

Mr. Collins: No objection to that.

The Court: That will be given.

The next one:

> "The defense of contributory negligence which is set out in the answer of the defendants is an affirmative defense, the burden of proving which is on the party alleging it, and until the contrary [167] appears, it is presumed that the plaintiff at the time and place of the accident in question, was not guilty of any negligence himself, but was exercising reasonable care for the protection of his own safety."

I modified that by striking out, "but was exercising reasonable care for the protection of his own safety." I do not think that ought to be given.

Mr. Collins: I think it should read, "until the contrary appears from all the evidence."

The Court: "from all the evidence"; I will insert that in there. So it will now read: "* * * and until the contrary appears from all the evidence, it is presumed that the plaintiff * * *"

Any objection to that?

Mr. Collins: I think that should be crossed out.

The Court: "but was exercising reasonable care for the protection of his own safety?"

Mr. Collins: Yes.

The Court: It will be given as modified.

The next one:

> "It is a presumption of law that all persons use ordinary care for the protection of their own safety. This presumption is in itself a species of proof to the benefit of which the plaintiff in this [168] action is entitled, unless and until it is overcome by contrary evidence."

Mr. Collins: I will object to that.

Mr. Brobst: I think that is improper. I will withdraw that.

The Court: I will mark it withdrawn.

Mr. Brobst: I think there is some serious question when the defendant himself has testified.

The Court: The next one:

> "I charge those members of the jury who have had previous experience as trial jurors in negligence cases arising under State laws, to dispel from their

minds any and all conceptions that they may have with respect to the law of negligence as gained from the instructions of the Court in those cases, because in some respects and State and National laws conflict, and in actions under this Federal Employers' Liability Act, which proceed under National instead of State authority, you are bound to follow the instructions as now given to you by the Court which proceed upon National, as distinguished from State, authority."

Any objection?

Mr. Collins: I see nothing wrong with that instruction.

The Court: Very well. I will give that one. [169]

The next one:

"An employee has a right to assume that his employer has furnished him with safe appliances with which to work."

Any objection?

Mr. Collins: I think that should be "with reasonably safe appliances."

Mr. Brobst: I think the language is "safe appliances."

The Court: The authorities I have say "ordinary reasonable care."

Mr. Brobst: The appliance must be safe.

Mr. Collins: Certainly it would be safer to put the word "reasonable" in there.

The Court: "with reasonably safe appliances." I think that is fair. I think though they have the right to assume that they are furnishing safe appliances. I won't insert the word "reasonably." I think this is all right, counsel, "safe appliances."

Mr. Brobst: That is the statute.

The Court: Yes, that will be given.

Now the next one:

> "Under the Federal statutes relating to the obligation of an interstate carrier to its employees, such a carrier has a duty to provide employees a reasonably safe place within which to work and [170] reasonably safe appliances and where the breach of that duty is the proximate or contributing cause of injury to an employee, the carrier is liable therefor and the defense of assumption of risk is unavailable."

Mr. Collins: You see, in that instruction it is quoting from the statute and it uses "reasonably safe place." In the preceding one you say it is not true, although quoting from the statute itself.

The Court: I think probably I had better put back "reasonably" in that previous instruction because there will be a conflict if I do not.

Mr. Collins: Then the further objection to the instruction that you have just read is that there is no issue involved about furnishing reasonably safe appliances.

Mr. Brobst: There is no question about that, but that we can modify by striking out the "reasonably safe place to work." That leaves safe appliances again.

Mr. Collins: That is all right.

The Court: I will strike out the words "safe place within which to work and reasonably," so that it will read, "such a carrier has a duty to provide employees a reasonably safe appliance and where the breach of that duty is the proximate or contributing cause of injury to an employee, the carrier is liable therefor and the

defense of assumption of risk is un- [171] available." Tha. will strike out the "safe place within which to work."

Mr. Collins: That is all right.

The Court: That will be given as modified.

The next one:

> "A railroad is charged with the duty of exercising reasonable care to furnish its employees with reasonably safe tools adapted to the purposes for which those tools are furnished."

The Court: That is just a repetition. It speaks of appliances and tools. I think it is a repetition.

Mr. Collins: There are three of them together.

Mr. Brobst: It is stated in different words. If you feel it is a repetition, why all right.

Mr. Collins: I think you would prefer to use the middle one on which we cut out about the safe place to work in.

Mr. Brobst: I think the first two would probably be all right.

The Court: Do you want to withdraw this one?

Mr. Brobst: Yes, I will withdraw it.

The Court: I will mark it withdrawn.

The next one:

> "Plaintiff, at the time and place of the accident referred to in the complaint, being engaged in the conduct of interstate commerce, the statutes [172] of the State of California governing employers' liability and workmen's compensation are not applicable to this case, and plaintiff's right to recover, if any, is based on the statutes of the United States covering the liability of common carriers by railroads

to their employees for injuries sustained while in the course of their employment."

Mr. Collins: There is no objection, but it has been given in exactly the same language in another instruction.

The Court: The one ahead of it?

Mr. Collins: Yes.

Mr. Brobst: If there is another one that repeats it, we will cut it out.

The Court: Yes, there is another one that covers it.

Mr. Brobst: One is to dispel from your minds, and this deals squarely with it.

Mr. Collins: You can't use both of them.

Mr. Brobst: One says the State laws and the first one doesn't mention compensation.

Mr. Collins: Yes, it does. I can write instructions and put them in a dozen different forms but that doesn't mean they are not repetitious.

The Court: I doubt if this is a repetition. I do not think it is. That will be given. [173]

Now the next one:

"If from the evidence in the case and under the instructions you find the issues for the plaintiff, then in order to enable you to estimate the amount of such damages as you may allow for pain and suffering, it is not necessary that any of the witnesses should have expressed an opinion as to the amount of such damages, if any; you may estimate such damages from the facts and circumstances and evidence and by considering them in connection with your own knowledge and experience in the affairs of life. With regard to pain and suffering the law prescribes no definite measure of damages, but leaves such damages to be fixed by you as your

discretion dictates and as under all the circumstances may be just, reasonable and proper, not exceeding the amount prayed for in the complaint."

Mr. Collins: I have no objection to that instruction whatever.

The Court: I will mark it given.

The next one:

"Although an employee is bound to exercise ordinary care in the use of tools furnished him by the employer, there is no affirmative duty of inspection required of the employee to discover de- [174] fects in appliances not so obvious that, with ordinary care in their proper use he would naturally discover the defects."

Mr. Collins: I see nothing wrong with that.

The Court: That will be given.

The next one:

"Where plaintiff's contributory negligence and defendant's violation of a provision of the Safety Appliance Act are concurring proximate causes, the Federal Employers' Liability Act requires plaintiff's contributory negligence, if any, to be disregarded."

I suggest cutting out "disregarded" and adding, "and shall not bar a recovery but the damages, if any, shall be diminished."

Mr. Collins: That instruction would be wrong because the Safety Appliance Act applies.

Mr. Brobst: Here is the problem there, Judge: Now we are coming to the Safety Appliance Act, and I might say a word on that.

I have put in, I think, about four instructions about the Safety Appliance Act which include hand brakes. The theory of putting them in was that these men testified that in order for those hand brakes to operate efficiently they had to use a brake club. It was brought out there that in the Tucson yards [175] these men use a brake club on that type of brake, and I feel that under that evidence, in order to make the brakes work efficiently, the requirement that they use a brake club makes the brake club a part of the brake, and therefore the Safety Appliance Act is applicable.

Now as far as the question of pleading that is concerned, it is not necessary to plead it, the authorities hold, where the facts show that the act is applicable.

Now in order to cure that I have prepared an instruction which I think should precede this.

The Court: Let us dispose of this one first.

Mr. Brobst: That will be correct, that the Safety Appliance Act applies, and I have prepared an instruction which makes it a question of fact for the jury as to whether or not that act applies, which I think should precede those instructions.

The Court: Precede this one?

Mr. Brobst: Yes, the two or three that I have inserted.

Now if the Safety Appliance Act does not apply, that will be error. If it does apply, it is a proper instruction.

Mr. Collins: The statute provides what shall constitute safe appliances and counsel is now attempting to say that because a brake club broke when winding up a brake that it then comes under the Safety Appliance Act, which of course is impossible. It never has applied. It isn't even mentioned [176] either in the statute or in the Interstate Commerce Commission in any of

their rules and regulations. A brake club is not any part of the equipment. If there ever would be a case of error, it would be to instruct under the Safety Appliance Act.

The Court: Is there any evidence as to that?

Mr. Brobst: Yes, the evidence is in that those brakes would not work efficiently without a brake club, and in the Tucson yards they are required to use a club to set those brakes. So if it is required to be used, it seems to me it becomes a part of the hand brake. They testified they couldn't set them without the hand brake, as a matter of fact.

The Court: Contributory negligence is only to be considered in figuring the damage.

Mr. Brobst: Under the Federal Employers' Liability Act, yes.

The Court: You cannot ignore that. You have to consider that.

Mr. Brobst: If it falls under the Safety Appliance Act then there is absolute liability. Reasonable care on the part of the defendant makes no difference, neither contributory negligence nor assumption of risk. The railroad then becomes an insurer. If they find that it was a necessary part to make the hand brake work efficiently, then they can apply the provisions of the Safety Appliance Act, but not otherwise. In other words, that would be a question for the jury to de- [177] termine, whether or not it is a part of the brake, and I think that is proper.

Mr. Collins: In other words, counsel wants you to lead the jury to say what is a safe appliance under the Safety Appliance Act, which they know nothing about. The statute has described what comes within the purview of that act, and counsel can't put that in.

Mr. Brobst: I can show you a case under the Boiler Inspection Act where it was left to the jury to determine the provisions of the boiler inspection applied to an engine which was going into a yard, that it was proper for them to do that. That is the same thing here, whether it comes under the provisions of the Safety Appliance Act or not.

Mr. Collins: I don't think so. In other words, the next thing you will be saying is that a lantern comes under the Safety Appliance Act.

Mr. Brobst: The evidence is that these brakes can't be set without the use of a brake club, that they could not be manipulated without a brake club.

Mr. Collins: Just remember this, Judge Cavanah, this plaintiff himself said —

The Court: I see here your written objections to these instructions. Counsel filed written objections. You have seen that?

Mr. Brobst: Yes. [178]

The Court: I will consider those as I go along too.

Mr. Collins: Just remember this, the plaintiff in this case testified that this brake was in good condition, in good shape, and that there was nothing wrong with it.

Mr. Brobst: That is not synonymous with efficient operation. Defect makes no difference.

Mr. Collins: It has nothing to do with the operation or the use of a brake club.

The Court: Where does your objection come in?

Mr. Collins: Mine are in the order in which I have the instructions.

Mr. Brobst: These written objections are addressed to this very subject that we are on now.

The Court: The first thing we have to do is pass on this instruction that you just handed me.

Mr. Brobst: The whole question is this, your Honor: What I want to do is submit the question to the jury by the instruction that you are reading, for them to determine whether the provisions of the Safety Appliance Act apply, as to whether this brake club was a part of the braking equipment so as to fall within that act. If they find that it was part of the braking equipment, then they are to apply the instructions before you, but not otherwise. I think it is perfectly proper to do it that way.

The Court: This part of the instruction is all [179] right when you apply the following instructions * * *"

Mr. Collins: May I be heard on that question?

The Court: Yes.

Mr. Collins: If, as counsel contends, which I do not believe by the widest stretch of the imagination, that a brake club can be considered a part of the equipment, there has been no violation of the Safety Appliance Act for the reason that there is no evidence, considering the brake club as a part of the brake, which I am sure it is not, that it didn't work efficiently in slowing down this car was that it was coming to a gradual stop and didn't come into collision, the brakes did work effectively with the use of the club, then if, as counsel says, it is a part of the equipment then it did work efficiently because the plaintiff said it did, and there is no room for those instructions whatsoever.

The Court: The trouble is that a lot of these instructions are asking me to discuss the force and effect of certain evidence, and I am not going to do that.

Mr. Collins: I have given you my reasons why those instructions should not be given. Certainly it would be error if they were given.

I agree with counsel that if it shows that there is defective equipment, then the Safety Appliance Act comes

in whether it has been pleaded or not, but there is no showing that there has been any defective equipment. The [180] only charge in the complaint is that we gave him a brake club which was defective and we didn't furnish him with a safe brake club to use. How you can stretch to say that a brake club is part of the equipment of a brake, when under the safety appliance rules it expressly states what constitutes a brake. Counsel is familiar with the safety appliance rules, and I think he is just leading the Court into trouble.

If counsel can show me, either in the safety appliance rules as laid down by the Interstate Commerce Commission, or in the statute, where there is even a mention of a brake club then I will withdraw all objections. You can't inject the Safety Appliance Act just because you think it can be good for your case if you can get it in there.

The Court: If this instruction is not allowed all the others will go out too.

Mr. Brobst: That is correct.

The Court: You are charging that they didn't furnish a safe brake club?

Mr. Brobst: Yes, your Honor, but the law is to this effect, that if the evidence shows that the Safety Appliance Act is applicable, it need not be pleaded and you are entitled, that is, the employee is entitled, to the benefit of the act.

Mr. Collins: There is no question about that, but there is no evidence here of a violation of the Safety Appliance Act. [181]

The Court: You say it does apply. In what way?

Mr. Brobst: In this way: The testimony is this, that you could not set those brakes by hand in the Tucson yard, that to make them operate efficiently they had to

use a brake club, and that the company required that they use a brake club to make them operate efficiently. So I think under that evidence the jury has a right to find that the brake club was a necessary part of those hand brakes because they couldn't be operated and set without the club.

The Court: There is evidence of course that it is necessary to use this club in operating the brake.

Mr. Collins: Understand this, Judge Cavanah, there can be no violation of the Safety Appliance Act unless there is a violation of the specifications laid down by the Interstate Commerce Commission as to what constitutes what a safe appliance is. In other words, they tell you that the brakes shall be such a shape or such a length, the chain will be such a length, hand bars will be fastened in such and such a manner, and so on.

Mr. Brobst: No. If the brake kicks back without showing any evidence, that is evidence enough.

Mr. Collins: There is no evidence that it was deficient. If the club breaks and you charge specifically we gave him a club that was not safe, that is a different matter.

The Court: I think I should limit the principles [182] of law to your specific allegation of negligence under the statute.

Mr. Brobst: That is true, your Honor, except as I have said, that where the evidence shows that the Safety Appliance Act applies which includes efficient hand brakes, then we are entitled to the benefit of that act without pleading it.

The Court: There isn't any evidence here that the Safety Appliance Act applies.

Mr. Brobst: We have here a safety appliance, which is a hand brake, and if the jury would find the brake club is a part of it and it breaks, and he is injured, he is

entitled to recover without regard to reasonable care, contributory negligence, or anything else.

Mr. Collins: I think if the Court gives those instructions it would not only be error but so confusing to the jury that they wouldn't know what they were doing.

The Court: Do you have the Safety Appliance Act handy?

(The document referred to was passed to the Court.)

Mr. Collins: If counsel can show me anywhere in the statute that there is any reference made to clubs, as I said before, I will withdraw my objections completely.

The Court: That is what I am trying to find out here.

Mr. Collins: It isn't in there.

Mr. Brobst: It isn't in there, but the thing is to make it operate efficiently they had to use the brake club, and I think the jury has a right to find that it is a part [183] of the hand brake. As a matter of fact, they said that it wouldn't tie down by hand which in itself I think, even that bare statement, would make it an inefficient hand brake if it wouldn't tie down by hand.

Mr. Collins: That is just stretching your imagination all over the place.

The Court: You are asking me to discuss and give force and effect to a conclusion from the evidence. You are asking me to do that to the jury. You are pointing out a fact for me to instruct the jury on.

Mr. Brobst: If they find that it is part of the brake, then they apply the safety appliance sections.

Mr. Collins: I think, your Honor please, we don't have many rights under these statutes but I think this is one we do have. If you read this section again, Judge Cavanah, I believe you will find my contention is correct.

The Court: He is saying that this club from the evidence is part and is necessary to have to operate that hand brake. That is what he is contending.

Mr. Brobst: The evidence is uncontradicted on that point, that the brake wouldn't stop by hand and that they had to use a club.

Mr. Collins: I take the position that it is not a part of the hand brake. If it was, it would be carried with the brake itself. He has charged us in his complaint [184] with only one thing, giving him a club that broke. This lets the jury speculate as to what constitutes part of a hand brake without any evidence whatever to guide them.

Mr. Brobst: They have uncontradicted evidence that it was set by hand and that was the only way that it could be set. It was necessary to use a club, and the company required that they use a club. That isn't contradicted at all. Certainly to me it is a necessary part of the brake when it won't stop without the use of a club.

The Court: I will allow it.

Then what follows that is this instruction about:

> "Where plaintiff's contributory negligence and defendant's violation of a provision of the Safety Appliance Act are concurring proximate causes, the Federal Employers' Liability Act requires plaintiff's contributory negligence, if any, be disregarded."

What bothers me is whether you can disregard that. I think you have to consider the plaintiff's contributory negligence even in awarding the amount of damages.

Mr. Brobst: If you find a violation of the Safety Appliance Act then they are to disregard it.

The Court: That will be given.

We will take up counsel's objections as we go along, but they cover that all the way through. That is all [185] your objections cover then.

Mr. Brobst: The written objections cover that particular point, Judge.

The Court: I will just cross this one out and put another one in order.

> "The Federal Safety Appliance Act imposes upon the railroad carrier an absolute duty to equip its cars with hand brakes and appliances prescribed in the act and to equip and maintain such hand brakes in an efficient condition; and the liability for failure to maintain efficient hand brakes is absolute, regardless of negligence on the part of the railroad company or contributory negligence on the part of the plaintiff."

That will be allowed.

The next one:

> "The Safety Appliance Act provides that all cars shall be equipped with efficient hand brakes. To be efficient the hand brake must be capable of operation and kept in such condition that it shall at all times be operative, and therefore, the test of compliance with the requirement of the statute is primarily effectiveness in operation and the question is whether or not it was able to produce the expected result when properly applied and if it [186] was so effective then it would be deemed efficient."

Mr. Collins: That is repetition.

Mr. Brobst: I think that is probably repetition.

The Court: Do you want to withdraw it?

Mr. Brobst: I will withdraw it.
The Court: I will mark it withdrawn.

The next one:

"Under the law, the defendant was bound to furnish the plaintiff efficient hand brakes at the time in question and defendant was absolutely bound to keep and maintain the hand brakes in an efficient condition at all times so as not to expose the plaintiff to unnecessary peril in the conduct of his duties."

Mr. Collins: That is repetition too.
Mr. Brobst: Yes. I will withdraw that.
The Court: I will mark it withdrawn.
Mr. Collins: The next one is repetition too.

The Court: "A portion of the Federal Safety Appliance Act in effect at the time of this accident relating to hand brakes on railroad cars provides as follows:

"'It shall be unlawful for any common carrier subject to the provisions of this chapter to haul or permit to be hauled or used on its line any car subject to the pro- [187] visions of this chapter not equipped with efficient brakes.'"

Mr. Collins: That is merely stating it in another way.
The Court: That is giving the statute.
Mr. Collins: They both say the same thing.
The Court: It is the same thing.
Mr. Brobst: All right. I will withdraw it.
The Court: I will mark it withdrawn.
Mr. Brobst: Now these two will have to go forward with these because they have to do with the Federal Employers' Liability Act. One is contributory negligence

and one is on assumption of risk. So they would go ahead of these here. You can insert those here. Put them in front of this instruction.

The Court: These can go right in here.

Mr. Brobst: Then the instruction on damage can follow.

Mr. Collins: Don't you think damage should follow the instructions?

Mr. Brobst: I want to keep straight the Safety Appliance Act instructions.

The Court: That is all the instructions you want?

Mr. Brobst: Yes, your Honor.

The Court: Now we will take up the defendant's proposed instructions.

Mr. Collins: Mine are all numbered.

The Court: Your objections relate to the matter [188] we discussed?

Mr. Brobst: Yes, your Honor.

The Court: Now we are through with your objections and we will take up the defendant's instructions.

The first one reads:

> "The Court instructs the jury to find the issues in favor of and return a verdict in favor of the defendant, the Southern Pacific Company."

That is refused.

The next one:

> "In case the Court refuses to give the foregoing instruction, then and in that event only, defendant requests each of the following instructions."

That will have to be refused because you are asking generally to give consideration. That will be refused.

Your instruction No. 3:

"The instructions which I am about to read to you are the instructions of the Court and you are expected and required under the law to follow the same. It is your duty to consider, not one of these instructions, but all of them together, and to construe them together for the purpose of definitely ascertaining the law upon the questions now submitted to you. It is further the duty of the Court to instruct you upon all phases of the law [189] which apply to any fact or circumstances which is in evidence and upon which you may find, regardless of what the Court thinks the weight of evidence shows.

"You are the sole and exclusive judges of what the facts are. It is for you to judge of the credibility of the witnesses and to determine what the truth is. Having ascertained what the facts are, it is further your duty then to arrive at your verdict in accordance with that law and those facts, without passion or prejudice, or sympathy for either party."

There is no objection to that, is there?

Mr. Brobst: No.

The Court: I can see no objection. It is covered in the general instructions.

Mr. Brobst: It is probably a general instruction.

The Court: I will look and see if there is any repetition. It will be given anyhow, you understand.

Mr. Collins: Yes.

The Court: No. 4:

"In this case the plaintiff claims to have sustained damages by reason of the negligence of the Southern Pacific Company, defendant. The burden is upon plaintiff to prove such negligence by a preponderance of the evidence, and to prove further that such negligence [190] upon the part of the Southern Pacific Company contributed directly and proximately to the damages sustained. On both these issues the burden is upon the plaintiff. Unless the plaintiff proves both the negligence of the Southern Pacific Company and that such negligence directly and/or proximately contributed to the damages sustained, there can be no recovery herein and your verdict must be against the plaintiff and in favor of the defendant."

Mr. Collins: Any objection to No. 4, counsel?

Mr. Brobst: Yes. It is uncertain; the "and/or" makes it error.

Mr. Collins: I think the word "and" should be stricken.

The Court: That will be allowed.

No. 5: ——

Mr. Collins: No. 5 is a repetition.

The Court: Do you want to withdraw that?

Mr. Collins: Yes.

The Court: No. 6:

"Before negligence can be held to be actionable it must be shown to be the direct and proximate cause of the injury complained of, that is to say, a causal connection must be shown to exist between

negligence and injury, and the negligence complained of must proceed in [191] an unbroken course to the very point of inflicting the injury. If the negligence claimed to be the cause of the injury is shown to have been interrupted by a separate, independent, intervening act of a third party, negligent or otherwise, then the chain of causation is broken, and the negligence complained of becomes a remote contingency which can no longer be considered the proximate cause of the injury."

Mr. Collins: Do you have any objection to No. 6, counsel?

The Court: When I read that through I couldn't see any objection to it.

Mr. Brobst: There is no evidence that any independent third party came into this at all. It is just bringing in an extraneous matter into the case.

Mr. Collins: All right. We will withdraw it.

The Court: I will mark it withdrawn.

Next one:

"You are instructed that the proximate cause is the efficient cause, the one that necessarily sets the other causes in operation."

Mr. Brobst: No objection to that.

The Court: That will be given.

No. 8: [192]

"You are instructed that the mere happening of the accident raises no presumption whatever that the defendant was negligent, or that its negligence, if it were guilty of any negligence, was the proximate cause of said accident."

Mr. Brobst: That is all right.

The Court: That will be given.

No. 9:

> "You are instructed that the defendant is not liable under any theory of this case unless you find that it was guilty of some negligence which was a proximate cause of the accident; otherwise you will return a verdict in favor of the defendant regardless of any and all other circumstances."

Mr. Brobst: That is just another repetition of proximate cause.

Mr. Collins: I don't think so.

Mr. Brobst: That one instruction that says you can't recover unless it is the proximate cause, I think that is the law.

Mr. Collins: I think this is a different instruction.

Mr. Brobst: I think defendant's instruction No. 4 covers the whole thing.

The Court: That covers it, doesn't it? This is just repetition. Do you insist on No. 9? [193]

Mr. Collins: No, I guess not.

I have amended this instruction now so I think it will meet with your approval.

The Court: It is the same thing.

Mr. Collins: You have no objection to the form of that instruction, have you?

Mr. Brobst: It is almost a direction and I don't feel that it should be given.

Mr. Collins: Let's change it so it won't be a direction.

The Court: I do not think I should give it.

Mr. Collins: Probably not in that form, but I think you have to instruct on that question.

How does this sound to you?

"You are instructed that one who purchases an article from a manufacturer of recognized standing, then he has a right to assume that in the manufacture thereof proper care was taken and that proper tests were made, that when it was delivered it was in a fair and reasonable condition for use."

Mr. Brobst: I think that is just language out of a case and it is not a summary of the law at all.

Mr. Collins: It is a statement of the law.

Mr. Brobst: But it is qualified by the Supreme Court.

Mr. Collins: Then I add to that:

"Unless there was some apparent, patent defect in the instrumentality which reasonable inspection would disclose." [194]

Mr. Brobst: Even that doesn't cure it. That is a question for the jury. Even the Supreme Court qualifies that language.

Mr. Collins: You admitted evidence that we did buy it through a reputable firm. Now, then, if the law means anything and it says that if we do that we have a right to rely that it is going to be an instrumentality that is satisfactory, then the jury is entitled to know if there is such a law.

Mr. Brobst: This is a used club and not a new club.

Mr. Collins: They contemplate all clubs will be used and when you manufacture them you manufacture them with the idea that they will be used.

Mr. Brobst: I don't think it is right.

The Court: I cannot see it.

Mr. Collins: Certainly we are entitled to an instruction along that line.

The Court: I will have to deny this. This one you want to put in the regular instructions?

Mr. Collins: I am going to submit this corrected one tomorrow morning which I have just read to you.

The Court: This one is 9-A.

Mr. Collins: I will call it 9-B in submitting the amended instruction. [195]

The Court: No. 10:

> "You are instructed that the mere fact that the defendant may have been negligent, if you find that the defendant was negligent, would not be sufficient to render it liable under any theory of this case. It would be necessary for the negligence, if any, on the part of the defendant, to have been a proximate cause of the injury. If it was not a proximate cause then the defendant would not be liable at all. What is meant by 'proximate cause' is stated to you in another instruction."

Mr. Brobst: I think that is another one of those like No. 5 which covers the proximate cause.

The Court: I have instructed them on proximate cause five or six times already.

Mr. Brobst: I think that is right. That one instruction covers both proximate cause and negligence and I don't think it should be repeated.

The Court: Do you insist on this one? I think it is repetition.

Mr. Collins: All right.

The Court: It is withdrawn?

Mr. Collins: Yes.

The Court: Now the next one, No. 11:

"You are instructed that reasonable care in [196] the matter of inspection requires the defendant to make such examination and tests as a reasonably prudent man would deem necessary under the same or similar circumstances for the discovery of defects. The defendant is not required, unless put upon notice as to any probable existence of defects, to employ unusual or extraordinary tests, nor even to use the latest and most improved methods of testing its tools. If you believe from the evidence that the Southern Pacific Company used the same degree of care which persons of ordinary intelligence and prudence, engaged in the same kind of business, commonly exercised under like circumstances in the inspection of its tools, then, and in that event, I instruct you that the Southern Pacific Company is not guilty of any actionable negligence and your verdict should be for the defendant."

Mr. Brobst: That is wrong. I have no objection to it down to the word "tools," where it says, "even to use the latest and most improved methods of testing its tools," but I think the next paragraph that follows, begining with "If you believe from the evidence that the Southern Pacific Company used the same degree of care," I know that is wrong.

Mr. Collins: These authorities that I have cited state that. [197]

The Court: I will allow it as modified by cutting out commencing with, "If you believe from the evidence," down to and ending with "your verdict should be for the defendant." Now down to that point I understand there is no objection?

Mr. Brobst: That is right.

The Court: The rest is objectionable?

Mr. Brobst: Yes.

The Court: It will be given as modified.

No. 12:

"You are instructed that the defendant, the Southern Pacific Company, is not liable for those risks which it could not avoid in the observance of its duty of due care. In applying the above principle in this case, while it is true that the plaintiff did not assume the risks of danger in his employment, nevertheless, he can only recover in this case by proving by a preponderance of the evidence that the defendant, the Southern Pacific Company, through its agents, servants, or employees, was guilty of negligence which, in whole or in part, proximately caused the accident and any injuries or damages resulting therefrom, and if you find from a preponderance of the evidence that the dangers, if any, to which the plaintiff was subjected, and which caused his injuries, if any, could not have been avoided by the defendant, the Southern Pacific Company, in the exercise of reasonable care, then the plaintiff is not entitled to recover against the defend- [198] ant, and you should return a verdict in favor of the defendant."

Mr. Brobst: I think that is a compound and argumentative instruction.

Mr. Collins: It is out of the latest case.

Mr. Brobst: It is an argumentative instruction.

Mr. Collins: It is simply a plain statement of the law.

Mr. Brobst: But in this case they can bring in a verdict if they find it is a violation of the Safety Appliance Act.

Mr. Collins: I am perfectly willing to add, "unless you find that there was a violation of the Safety Appliance Act."

Mr. Brobst: This is one of those formal instructions. It directs a verdict. I think it is all covered in proximate cause.

Mr. Collins: I am perfectly willing that there be a period after "therefrom," if you want to modify it in that respect.

The Court: It would take away entirely the consideration whether this club was defective or not.

Mr. Brobst: That is the whole thing.

The Court: That is the statute and that is what is specifically alleged, not negligence of its agents. They are pleading specific negligence, which was the defectiveness of this club. [199]

Mr. Brobst: I think it is entirely wrong.

The Court: I will have to refuse it.

Mr. Collins: You mean to say that they can recover without respect to negligence?

Mr. Brobst: That is all covered in proximate cause.

The Court: This will be refused.

The next one, No. 13:

> "You are instructed that the defendant is not an insurer of the safety of its employees, and that before the plaintiff can recover in this case, he must prove by a preponderance of the evidence that the defendant has been guilty of negligence that proximately contributed to his accident and any damages sustained by him."

Mr. Brobst: I have no objection if there is added, "is not an insurer of the safety of its employees unles you find from a preponderance of the evidence that the provisions of the Safety Appliance Act apply.

Mr. Collins: We are still not the insurer of the safety of the employees at any time. You know that.

Mr. Brobst: Then if you want to add at the end, "unless you find from a preponderance of the evidence that the provisions of the Safety Appliance Act apply."

Mr. Collins: No, even the Safety Appliance Act doesn't make up an insurer of their safety. [200]

Mr. Brobst: I say, add at the end, "unless you find."

Mr. Collins: Then we become an insurer, according to your theory, which isn't the law.

Make it read: "You are instructed that the defendant is not an insurer of the safety of its employees, period."

Mr. Brobst: That is all right, if you strike out the rest. I have no objection to it then.

Mr. Collins: All right. Make it "employees," period.

The Court: Then the rest goes out. It will be given as modified.

The next one, No. 14:

> "You are instructed that defendant, the Southern Pacific Company, is only required to exercise ordinary care and diligence to use and adopt appliances or equipment in known practical use to secure the safety of its employees, and is not bound or required to use or adopt every new appliance or type of equipment which the highest scientific skill might suggest. It is complying with its full duty in this regard if it exercises ordinary care to adopt and use ordinary safe appliances or equipment in known use under similar circumstances."

Mr. Brobst: I don't know whether that meets the facts here or not.

Mr. Collins: That is a good instruction.

The Court: I do not see any objection to that. [201]

Mr. Brobst: I just don't think it applies.

The Court: There is some evidence here on that. They put a man on the stand with regard to that. It will be given.

No. 15:

> "You are instructed that the term 'latent defect' means a defect that is not visible or apparent; a hidden defect; it applies to that which is present without manifesting itself; it cannot be discovered by mere observation."

Mr. Brobst: "or test."

Mr. Collins: You want to add something in there?

Mr. Brobst: Yes. That it can't be discovered by mere observation. I don't think that covers it completely.

Mr. Collins: I think it does. That is your absolute definition of a "latent defect." You can't change the entire dictionary or the decisions of the Supreme Court because it doesn't sound good.

Mr. Brobst: I think you are required to do more than that. You have to make observations.

The Court: You have to go further.

Mr. Collins: "or simple test," you want added in there?

Mr. Brobst: That isn't the law.

The Court: I can strike out, "it cannot be discovered by mere observation."

Mr. Brobst: It applies to that which is present with- [202] out manifesting itself.

The Court: I think down to there is all right. The other, "it cannot be discovered by mere observation," that is argumentative. It will be allowed as modified and that portion will be stricken.

No. 16:

> "The law does not permit you to guess or speculate as to the cause of the accident in question. If the evidence is equally balanced on the issue of negligence or proximate cause, so that it does not preponderate in favor of the party making the charge, then he or she has failed to fulfill his or her burden of proof. To put the matter in another way, if after considering all of the evidence, you should find that it is just as probable that either the defendant was not negligent, or if it was, its negligence was not a proximate cause of the accident, as it is that some negligence on his part was such a cause, then a case against the defendant has not been established."

Mr. Collins: Do you have any objection to No. 16?

Mr. Brobst: Only this, this is under the State law and it doesn't include the Safety Appliance Act.

Mr. Collins: This is merely an instruction on our theory of the case. You have yours covered otherwise.

The Court: "If the evidence is equally balanced on the issue of negligence or proximate cause, so that it does not [203] preponderate in favor of the party making the charge, then he or she has failed to fulfill his or her burden of proof."

Mr. Brobst: I think to there it is a good instruction.

The Court: "To put the matter in another way," that is argument.

Mr. Brobst: I think so too. Down to the "burden of proof" is a good instruction.

The Court: If you put in this other, you are asking me to go into the evidence and argue. It will be allowed as modified by striking out commencing with "to put the matter in another way" down to the end of it. That is stricken out.

Now No. 17:

> "You are not permitted to award plaintiff speculative damages, by which term is meant compensation for prospective detriment which, although possible, is remote conjectural or speculative."

Mr. Brobst: There is nothing wrong with that.

The Court: That will be given then.

No. 18:

> "Neither the allegations of the complaint as to the amount of damage plaintiff claims to have suffered, nor the prayer asking for certain compensation, is to be considered by you in arriving at your verdict, except in this one respect, that the amount of damage alleged in the complaint does fix [204] a maximum limit, and you are not permitted to award plaintiff more than that amount."

Mr. Brobst: No. 18 is all right.

The Court: I can see no objection to that. It will be given.

The Court: No. 19:

> "A witness false in one part of his or her testimony is to be distrusted in others. If, therefore, you believe that any witness has testified falsely in regard to any fact, not as the result of mistake or inadvertence, but wilfully and with a design to

deceive, you must treat all of his or her testimony with distrust and suspicion, and reject it all, unless you shall be convinced that notwithstanding the base character of the witness he or she has in other particulars stated the truth."

Mr. Brobst: That is all right.

The Court: The rule is a little broader than that. This is all right as far as it goes, but if he is corroborated by other evidence in the case they accept his testimony. Maybe a man has testified falsely but if he is corroborated by other evidence it is received. I think there should be added to it, "or has been corroborated by other evidence."

Mr. Collins: That is all right. I think that includes [205] it, but I have no objection.

The Court: I do not see where it applies.

Mr. Collins: I am perfectly willing to withdraw it.

The Court: All right. It will be withdrawn.

No. 20:

"You are instructed that you should not permit any sympathy for the plaintiff, or bias against the defendant, the Southern Pacific Company, to influence you in any manner in arriving at your verdict. Your verdict must be based solely on the evidence received and the law as given to you in these instructions, and not upon anything you may have otherwise heard or read. The parties to this litigation are entitled to your calm, dispassionate judgment, the same as if they were not corporations, or were individuals, no more and no less."

Mr. Brobst: No. 20 is all right.

The Court: I have it marked "given" unless you have some objection.

Mr. Brobst: I have no objection.

The Court: No. 21:

> "In law we recognize what is termed an unavoidable or inevitable accident. These terms do not mean literally that it was not possible for such an accident to be avoided. They simply denote an accident that occurred without having been proxi- [206] mately caused by negligence. Even if such an accident could have been avoided by the exercise of exceptional foresight, skill or caution, still no one may be held liable for injuries resulting from it." Isn't that going pretty strong?

Mr. Brobst: That is in State courts, but it hasn't been used in the Federal Employers' Liability statute.

The Court: That is a little argumentative for me to put in. You ask me to put in a little argument now and then. I will allow it down to "proximately caused by negligence," and cut out that part, "even if such an accident could have been avoided by the exercise of exceptional foresight, skill or caution, still no one may be held liable for injuries resulting from it."

It will be allowed as modified.

No. 22:

> "You are instructed that in civil cases, such as this is, a preponderance of the evidence is required in order for the plaintiff to be entitled to recover; i. e., such evidence as, when weighed with that opposed to it, has more convincing force and from which it results that the greater probability is in favor of the party upon whom the burden rests. The burden of proof rests upon the plaintiff to prove and establish all of the controverted material [207] allegations of his complaint by a pre-

ponderance of the evidence; and if you find that the plaintiff has not sustained this burden of proof or if you find that the evidence is evenly balanced or that it preponderates in favor of the defendant, the Southern Pacific Company, then the plaintiff cannot recover from the defendant, the Southern Pacific Company, and in such case your verdict will be in favor of the defendant."

That latter part goes into argument again. I suggest up here on the second line, "a preponderance of the evidence, as I have said." I am speaking of the preponderance of the evidence three or four times here. I will insert in there, "as I have said." However, I don't know.

Mr. Collins: Why not change line 14 and say, "or that it preponderates in favor of the defendant, the Southern Pacific Company, then the plaintiff has not sustained the burden of proof." That gets your argument out of it.

Mr. Brobst: Of course this is repetition.

Mr. Collins: On line 14: "if you find that the evidence is evenly balanced or that it preponderates in favor of the defendant, the Southern Pacific Company, then the plaintiff has not sustained the burden of proof," and cross out the rest of that which counsel says is argument.

Mr. Brobst: I think it simply repetition. It is not [208] nearly as clear an instruction as the others. I don't know what that "i. e." means.

Mr. Collins: Namely.

Mr. Brobst: Then you get into argument again.

The Court: I have given that three or four times.

Mr. Brobst: I think just the first sentence, your Honor, is a good instruction, but the rest of it is argument.

The Court: Yes, the rest is argument. I will modify it by striking out the rest and allow it down to, "when weighed with that opposed to it."

Now No. 23:

> "You are instructed that you may not speculate as to whether the defendant, the Southern Pacific Company, was negligent with respect to any matters shown in connection with the alleged injury to plaintiff; but such negligence, if any, must be proved by the plaintiff by a preponderance of the evidence, and if the evidence leaves the real cause of the alleged injuries to plaintiff as a matter of conjecture or doubt, then your verdict shall be in favor of the defendant and against the plaintiff."

Mr. Brobst: I think that likewise is argument. It is also repetition, that he must prove his case by a preponderance of the evidence. [209]

The Court: You are asking them to speculate.

Mr. Brobst: The latest decisions, your Honor, in the Supreme Court have said that the jury can speculate and guess. That is an unusually liberal view, but in these cases, the latest cases, the Supreme Court of the United States has said that the jury has a right to speculate and that some conjecture and guess enters into all verdicts of the jury. That is the latest word by the United States Supreme Court.

As a matter of fact, I have that volume here, or I have a law review report on it, where it is set forth in an article. So I think that would be error. I think he has given instructions on preponderance of the evidence and proximate cause and burden of proof, and I think this goes beyond the latest opinions of the Supreme Court.

The Court: I think back here there was an instruction relating to that. I will insert in that the words "you cannot speculate." It is covered in a way that they cannot indulge in that. I think I will insert it over here, refusing this instruction, because I will cover it in another one. So I will refuse this one. There is another instruction over here where I can insert that.

Now the next one, No. 24:

> "You are instructed that if you believe from the evidence that the brake club in question was purchased from a reputable manufacturer then the railroad com- [210] pany cannot be charged with negligence because of any structural or inherent defect which was not patent at the time the club was delivered to the plaintiff for his use."

That will be refused.

Mr. Collins: You say that will be refused?

The Court: Yes:

Mr. Collins: Mr. Reporter, will you take this instruction so it can be accepted or rejected:

> "You are instructed that one who purchases an instrumentality from a manufacturer of recognized standing then he has the right to assume that in the manufacture thereof proper care was taken and proper tests were made and that when it was delivered it was in a fair and reasonable condition for use unless there was some apparent patent defect in the instrumentality which reasonable inspection or test would disclose."

The Court: That will be refused.

(Whereupon, at 5:30 o'clock p. m. the conference was adjourned.) [211]

Los Angeles, California; August 29, 1947;
10:00 o'clock A. M.

The Court: I ask you, ladies and gentlemen of the jury, to be patient for a while in presenting the instructions of the Court to you as there have been a large number of proposed instructions which the Court has had to consider.

INSTRUCTIONS TO THE JURY.

The Court: Ladies and gentlemen of the jury, the function you perform in a case of this kind, the duty you perform, is an important and necessary one. When you go to your jury room and come to consider your verdict, you will lay aside all suggestions which merely appeal to your feelings of prejudice, or your emotions, regardless of from which side they may have come in the case, and pass on it. Sometimes incidents inadvertently come into the trial of a case which really have no bearing upon it, and unless we are careful our judgment may be somewhat disturbed thereby. So that when you come to the real consideration of what your verdict should be careful to confine that consideration to the evidence, all of the circumstances in evidence, and only the fair and legitimate inference which may be drawn therefrom. After all, there is no reason for passion in the trial of this case. The issues are plain. It is a question as to whether or not the defendant was negligent and as to whether that negligence contributed to and was a proximate cause of the accident and [213] injury.

The complaint in this action is brought under the Federal Employers' Liability Act and it is not an action where workmen's compensation is awarded an employee merely because he was injured in the course of his em-

ployment. The statute under which the action is brought requires proof of negligence on the part of the employer which proximately contributed to the happening of the accident before any verdict in favor of the plaintiff can be rendered.

A portion of the Federal Employers' Liability Act in effect at the time of this accident, reads as follows:

> "In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; or by reason of any defeat or inefficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

A portion of the act just mentioned to you in effect at the time of this accident, provides also as follows:

> "In all actions hereafter brought against any such common carrier by railroad under or by [214] virtue of any of the provisions of this chapter to recover damages for personal injuries to any employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence, shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee; provided, that no such employee who may be injured or killed shall be held to have

been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

I hereby instruct you that under the terms of the Federal Employers' Liability Act, if you find that the defendant was guilty of any negligence whatsoever as alleged in plaintiff's complaint, and further find that such negligence proximately contributed to plaintiff's being injured, then your verdict must be in favor of plaintiff and against defendant.

The proximate cause of any injury is a cause which in its natural and continuous sequence, unbroken by any new cause, produces an event, and without which the event would not have occurred, but in order to warrant a finding that [215] the negligence is the proximate cause of an injury, it must happen from the evidence that the injury was the natural and probable consequence of the negligence and not to have been foreseen as likely to occur by a person of ordinary prudence in the light of the attending circumstances. There must be, as you see, therefore, a direct causal connection between the negligence of the defendant and the injury of the plaintiff. The negligence act of the defendant must be the proximate cause of the injury, that is, the real cause of the injury.

I will say to you further that with regard to pain and suffering the law prescribes no definite measure of damages, but the law leaves such damages to be fixed by you as your discretion dictates and under all circumstances may be reasonable and proper. It is not necessary, therefore, that any of the witnesses should have expressed an opinion as to the amount of such damages

for pain and suffering, but the jury may make such estimate of the damages from the facts and circumstances and evidence by considering them in connection with their own knowledge and experience in the affairs of life.

I will say to you that you are the exclusive judges of the weight and sufficiency of the evidence. You are not bound to decide in accordance with the testimony of any number of witnesses which does not produce conviction in your minds, against a lesser number. The direct evidence of one [216] witness who is entitled to full credit is sufficient for proof of any fact in a civil case.

If you find from the evidence that the plaintiff is entitled to a verdict, you must not, in ascertaining the amount, resort to the pooling plan or scheme which has sometimes been adopted by juries for fixing such amount. That plan or scheme is where each juror writes the amount to which he considers the plaintiff is entitled, and the amounts so written are added together, and the total is divided by 12. This is a scheme of chance and no element of chance may enter into your verdict or into the determination of any question necessary thereto.

I will say to you further that another portion of the Federal Employers' Liability Act in effect at the time of this accident, reads as follows:

> "Every common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars,

engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." [217]

While it is encumbent on plaintiff to prove his case by a preponderance of the evidence, the law does not require of the plaintiff proof amounting to demonstration or beyond a reasonable doubt. All that is required in order for plaintiff to sustain the burden of proof is to produce such evidence which, when compared with that opposed to it, carries the most weight, so that the greater probability is in favor of the party upon whom the burden rests.

The defense of contributory negligence which is set out in the answer of the defendants is an affirmative defense, the burden of proving which is on the party alleging it, and until the contrary appears from all of the evidence, it is presumed that the plaintiff at the time and place of the accident in question, was not guilty of any negligence.

I charge you members of the jury who have had previous experience as trial jurors in negligence cases arising under state laws, to dispel from your minds any and all conceptions that you may have with respect to the law of negligence as gained from the instructions of the Court in those cases, because in some respects the state and national laws conflict, and in actions under this Federal Employers' Liability Act, which proceed under national instead of state authority, you are bound to follow the instructions as now given to you by the Court which proceed upon national, as distinguished from state, authority. [218]

I will say to you further that an employee has a right to assume that his employer has furnished him with reasonably safe appliances with which to work.

Further, under the Federal statutes relating to the obligation of an interstate carrier to its employees, such a carrier has a duty to provide employees reasonably safe appliances and where the breach of that duty is the proximate or contributing cause of injury to an employee, the carrier is liable therefor and the defense of assumption of risk is unavailable.

The plaintiff, at the time and place of the accident referred to in the complaint, being engaged in the conduct of interstate commerce, the statutes of the State of California governing employers' liability and workmen's compensation are not applicable to this case, and plaintiff's right to recover, if any, is based on the statutes of the United States covering the liability of common carriers by railroad to their employees for injuries sustained while in the course of their employment.

I will say to you further that if from the evidence in the case and under the instructions you find the issues for the plaintiff, then in order to enable you to estimate the amount of such damages as you may allow for pain and suffering, it is not necessary that any of the witnesses should have expressed an opinion as to the amount of such damages, [219] if any; you may estimate such damages from the facts and circumstances and evidence and by considering them in connection with your own knowledge and experience in the affairs of life. With regard to pain and suffering, the law prescribes no definite measure of damages, but leaves such damages to be fixed by you as your discretion dictates and as under all the circumstances may be just, reasonable and proper, not exceeding the amount prayed for in the complaint.

Although an employee is bound to exercise ordinary care in the use of tools furnished him by the employer, there is no affirmative duty of inspection required of the employes to discover defects in appliances not so obvious that, with ordinary care in their proper use he would naturally discover the defects.

Another provision of the Federal Employers' Liability Act, heretofore mentioned by the Court, in effect at the time of this accident, reads as follows:

> "In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to any employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in [220] proportion to the amount of negligence attributable to such employee; provided, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

If you find that the plaintiff is entitled to recover you may award him such damages, within the amount claimed, as in your opinion will compensate him for the pecuniary damages proved to have been sustained by him and proximately caused him by the wrong complained of. And, in estimating the amount of such damages, you may consider the physical and mental pain suffered, if any, the nature, extent and severity of his injury or injuries, if any, the extent, degree and character of

suffering, mental or physical, if any, its duration and its severity, and the loss of time and value thereof, and the loss of earning capacity.

You may also consider whether the injury was temporary in its nature, or is permanent in its character, and from all these elements you will resolve what sum will fairly compensate the plaintiff for the injury sustained.

If you find that the plaintiff is entitled to recover, the measure of his recovery is what is denominated compensatory damages, that is, such sum as will compensate him for [221] the injury he has sustained.

If you find from a preponderance of the evidence that the hand brake on the tank car in question would not operate efficiently without the use of a brake club, and if you find further from a preponderance of the evidence that the brake club in question was a necessary part of the hand brake on the tank car, then and in that event only, you may apply the following instructions which I will give you.

Where plaintiff's contributory negligence and defendant's violation of a provision of the Safety Appliance Act are concurring proximate causes, the Federal Employers' Liability Act requires plaintiff's contributory negligence, if any, be disregarded.

The instructions which I am about to read to you are the instructions of the Court and you are expected and required under the law to follow the same. It is your duty to consider, not one of these instructions, but all of them together, and to construe them together for the purpose of definitely ascertaining the law upon the questions now submitted to you. It is further the duty of the Court to instruct you upon all phases of the

law which apply to any fact or circumstances which is in evidence and upon which you may find, regardless of what the Court thinks the weight of the evidence shows.

You are the sole and exclusive judges of what the facts are. It is for you to judge of the credibility of the wit- [222] nesses and to determine what the truth is. Having ascertained what the facts are, it is further your duty then to arrive at your verdict in accordance with that law and those facts, without passion, or prejudice, or speculation, or sympathy for either party.

In this case the plaintiff claims to have sustained damages by reason of the negligence of the Southern Pacific Company, defendant. The burden is upon the plaintiff to prove such negligence by a preponderance of the evidence, and to prove further that such negligence upon the part of the Southern Pacific Company contributed directly and proximately to the damages sustained. On both these issues the burden is upon the plaintiff. Unless the plaintiff proves both the negligence of the Southern Pacific Company and that such negligence directly or proximately contributed to the damages sustained, then there can be no recovery herein and your verdict must be against the plaintiff and in favor of the defendant.

You are instructed that the proximate cause is the efficient cause, the one that necessarily sets the other causes in operation.

The mere happening of the accident raises no presumption whatever that the defendant was negligent, or that its negligence, if it were guilty of any negligence, was the proximate cause of the accident. [223]

You are further instructed that reasonable care in the matter of inspection requires the defendant to make such examinations and tests as a reasonably prudent

man would deem necessary under the same or similar circumstances for the discovery of defects. The defendant is not required, unless put upon notice as to any probable existence of defects, to employ unusual or extraordinary tests, nor even to use the latest and most improved methods of testing its tools.

I will say to you further that the defendant is not an insurer of the safety of its employees.

You are further instructed that one who purchases an instrumentality from a manufacturer, he is justified in assuming that in the manufacture proper care was taken, and that proper tests were made of the different parts of the instrumentality, and that as delivered to him it is in a fair and reasonable condition for use, but it is never the duty of a purchaser not to make tests or examinations of his own, or that he can always and wholly rely upon the assumption that the manufacturer has fully and sufficiently tested.

You are instructed that the defendant company is only required to exercise ordinary care and diligence to use and adopt appliances or equipment in known practical use to secure the safety of its employees, and is not bound or required to use or adopt every new appliance or type of equipment which the highest scientific skill might suggest. It [224] is complying with its full duty in this regard if it exercises ordinary care to adopt and use ordinarily safe appliances or equipment in known use under similar circumstances.

The term "latent defect" means a defect that is not visible or apparent; a hidden defect; it applies to that which is present without manifesting itself.

The law does not permit you to guess or speculate as to the cause of the accident in question. If the evidence is equally balanced on the issue of negligence or proximate

cause, so that it does not preponderate in favor of the party making the charge, then he or she has failed to fulfill his or her burden of proof.

You are not permitted to award plaintiff speculative damages, by which term is meant compensation for prospective detriment which, although possible, is remote, conjectural or speculative.

Neither the allegations of the complaint as to the amount of damage plaintiff claims to have suffered, nor the prayer askng for certain compensation, is to be considered by you in arriving at your verdict, except in this one respect, that the amount of damage alleged in the complaint does fix a maximum limit, and you are not permitted to award plaintiff more than that amount.

The parties to this litigation are entitled to your calm, dispassionate judgment, the same as if they were not [225] corporations, or were individuals, no more and no less.

In law we recognize what is termed an unavoidable or inevitable accident. These terms do not mean litterally that it was not possible for such an accident to be avoided. They simply denote an accident that occurred without having been proximately caused by neglgence.

I will say to you the issues to be determined by you in this case are these:

First, was the defendant negligent? If you answer that question in the negative, you will return a verdict for the defendant. If you answer it in the affirmative, you have a second issue to determine, namely, was that negligence a proxinmate cause of any injury to the plaintiff? If you answer that question in the negative, plaintiff is not entitled to recover, but if you find it in the affirmative, you must then find on a third question:

was the plaintiff negligent? If you find that he was not, after having found in plaintff's favor on the other two issues, you must fix the amount of plaintiff's damages and return a verdict in his favor.

If you find that the plaintiff was negligent and that his negligence contributed proximately to the accident, you will first determine the amount of the damages sustained by him and then determine in what proportion, figured in percentages, did the negligence of the plaintiff contribute as a proximate cause of the accident. When you have determined [226] the percentage in which plaintiff's negligence contributed to cause the accident, you will then reduce the total damages previously found by you in such proportion as the percentage of plaintiff's negligence bears to the full amount of the damages previously found by you to have been sustained by him, and return your verdict for the difference.

I will say to you further, that if you believe from the evidence that the plaintiff in this case was negligent at the time and place here under consideration and for your determination and if such negligence on his part was the sole proximate cause of the injuries and damages, if any, sustained by plaintiff, then the plaintiff cannot recover and your verdict should be for the defendant.

At the outset of this trial, each party was entitled to the presumptions of law that every person takes ordinary care of his own concerns and that he obeys the law. These presumptions are a form of prima facie evidence and will support findings in accordance therewith, in the absence of evidence to the contrary. When there is other evidence that conflicts with such a presumption, it is the jury's duty to weigh that evidence against the

presumption and any evidence that may support the presumption, to determine which, if either, preponderates. Such deliberations, of course, shall be related to, and in accordance with, my instructions of the burden of proof. [227]

Now if you find in favor of the plaintiff, the next question for you to consider is the damages which you will award to the plaintiff. Here again there is no precise measure. The question of damages is necessarily committed to the good sense of the jury. You are to consider that question as you consider other questions, dispassionately and fairly, with the purpose in good faith to award to him such reasonable-damages as he has suffered, if any, all of course as a result of this alleged accident.

As I say, the burden of proof in this case, as in all civil cases, upon him who alleges the existence of a certain fact. So in this case the burden was upon the plaintiff to show to you, by a preponderance of the evidence, all of the elements of the claim to which I have drawn your attention.

As I have said to you, you are the sole judges of the facts and you must determine what the facts are from the evidence which has been introduced, and from the circumstances which have been detailed by the witnesses. That being your responsibility, it is also your right and duty to determine, to pass upon the credibility of witnesses and the weight to be given to their testimony. You will consider the interests which the witnesses, if any, have in the result of the trial, and all other facts and circumstances which in the common experiences of life you have learned bear upon human testimony and tend to make it truthful and reliable or, on the other [228] hand, tend to distort or color it.

You are instructed to follow the instructions of the Court as given. If I have referred to any fact in the case during the course of the trial, or in any of these instructions, that would indicate to you any opinion I may have of a fact, you will disregard that opinion or that impression and determine this case solely upon the facts as you find them from the evidence and the instructions and circumstances in evidence as they have been detailed to you by the witnesses.

All of you must concur in finding a verdict. A form of verdict has been prepared and will be handed to you. The bailiff will be sworn and you may retire with the bailiff.

(At this point the bailiff was duly sworn to take charge of the jury.)

The Court: You may retire with the bailiff.

(The jury retired from the courtroom or deliberations at 10:50 o'clock a. m.)

Mr. Collins: The defendant now takes exceptions to the instructions given by the Court which the defendant has heretofore excepted to in writing and presented to the Court, and also those instructions which the defendant discussed with the Court in chambers and excepted to and were taken down by the shorthand reporter.

May it also be stipulated, counsel, that the exceptions may go to all of those instructions which we discussed in [229] chambers?

The Court: That the Court ruled on?

Mr. Collins: Our objections and statements.

The Court: Which the Court refused and allowed?

Mr. Collins: That is right. I suppose the same may apply to the plaintiff equally.

Mr. Brobst: Plaintiff will take exception to the one instruction dealing with the question of supply of appliances by a reputable manufacturer; and all other objections that may have been made in chambers.

Mr. Collins: Just the same as mine?

Mr. Brobst: That is right.

The Court: The reporter took it all down.

Mr. Collins: Yes.

And may it also be stipulated that the verdict may be received in the absence of the Court and counsel?

Mr. Brobst: If that is satisfactory with the Court. I don't know what the rule is here. Do you require counsel to be present?

The Court: In civil cases they do not need to be, but in criminal cases they do.

Mr. Collins: May it be stipulated that the Court may receive the jury in court and further instruct them in the absence of counsel, either by reading those which have heretofore been given to the jury or any additional instructions [230] which the Court may deem necessary, provided that the court reporter takes down such instructions?

Mr. Brobst: I will stipulate to that.

Mr. Collins: And that either party may have 10 days stay of execution from and after the hearing and determination of any motion for a new trial?

Mr. Brobst: That is satisfactory.

Mr. Collins: It is further stipulated that in the event the jury has not returned a verdict by 10 minutes to 12:00, or any other time, that the bailiff may take them to lunch without the formality of bringing them into court and without the formality of any order of the Court, and any and all objections to the procedure is hereby waived by both parties?

Mr. Brobst: So stipulated.

Mr. Collins: May it be further stipulated that counsel for plaintiff objected to the instruction with reference to the right of the railroad company to rely on the product of the manufacturer on the ground that it wasn't appropriate and had no application under the facts in this case?

Mr. Brobst: That is right.

Mr. Collins: And that I made the objection to the instruction that it didn't state the law correctly and at that time stated what the law was.

I believe that is sufficient to cover both of us.

Mr. Brobst: I think so. [231]

Mr. Collins: Mr. Reporter, I just spoke to Judge Cavanah in the hall and he said that we both made proper objections to the instructions and that they are to relate back to the conference in chambers. [232]

Los Angeles, California; August 29, 1947;
3:00 o'clock P. M.

The Court: Mr. Foreman, have you reached a verdict?

The Foreman: We have.

The Court: The Clerk will read the verdict.

The Clerk: In the District Court of the United States, in and for the Southern District of California, Central Division.

William K. Carson, Plaintiff, v Southern Pacific Company, a Corporation, Defendant.

No. 6950-M, Civil; verdict of the jury.

We, the jury in the above-entitled case, find the issues in favor of the plaintiff, and assess his damages in the sum of eighty-five hundred dollars ($8500).

Dated: Los Angeles, California, August 29, 1947.

Glen Moore, Foreman of the Jury.

So say you all, ladies and gentlemen of the jury? (Assent.)

The Court: The jury will be excused until further notice.

(Whereupon, at 3:05 o'clock p. m., court was adjourned.)

[Endorsed]: Filed Oct. 1, 1947. [233]

[Endorsed]: No. 11773. United States Circuit Court of Appeals for the Ninth Circuit. Southern Pacific Company, a corporation, Appellant, vs. William K. Carson, Appellee. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed October 29, 1947.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth *District*

No. 11773

WILLIAM K. CARSON,

Plaintiff,

v.

SOUTHERN PACIFIC COMPANY, a corporation,

Defendant.

DESIGNATION OF RECORD TO BE PRINTED AND STATEMENT OF POINTS UPON WHICH DEFENDANT INTENDS TO RELY UPON APPEAL

DESIGNATION OF RECORD TO BE PRINTED

I.

The defendant requests the entire record be printed.

STATEMENT OF POINTS UPON WHICH THE DEFENDANT INTENDS TO RELY UPON APPEAL

I.

That the court committed prejudicial error in giving certain instructions to the jury requested by the plaintiff, duly objected to by the defendant.

II.

That the court committed prejudicial error in refusing to give certain instructions to the jury requested by the defendant.

III.

That the court committed prejudicial error in modifying and giving certain instructions to the jury requested by the defendant and duly objected to by the defendant.

IV.

That the court committed prejudicial error in giving certain instructions to the jury upon its own motion, duly objected to by the defendant.

V.

That the court committed prejudicial error by permitting the jury, by way of instructions, to speculate as to whether or not the Federal Safety Appliance Act applied, said instructions having been duly objected to by the defendant.

VI.

That the court committed prejudicial error by permitting the jury, by way of instructions, to speculate as to whether or not a brake club constituted a part of the braking mechanism of a car, when it was the duty of the court to decide that as a matter of law.

VII.

That the court committed prejudicial error in submitting to the jury, over the objection of the defendant, the inter-

pretation and application of the Federal Safety Appliance Act which was, under the undisputed evidence, a matter of law for the court and not an issue of fact for the jury.

VIII.

That the evidence is insufficient as a matter of law to support the verdict.

Dated this 28th day of October, 1947.

C. W. CORNELL
O. O. COLLINS
MALCOLM ARCHBALD
JOHN R. ALLPORT

By O. O. Collins

Attorneys for Defendant Southern Pacific Company

Received copy of the within Designation of Record, etc. this 28th day of October, 1947. Hildebrand, Bills & McLeod, by John M. Ennes (ea), Attorneys for Plaintiff.

[Endorsed]: Filed Oct. 29, 1947. Paul P. O'Brien, Clerk.